# THE

# *HEDÀYA*, OR GUIDE;

A

COMMENTARY

ON THE

MUSSULMAN LAWS:

TRANSLATED BY ORDER OF THE

GOVERNOR-GENERAL AND COUNCIL

OF

*BENGAL*,

BY

CHARLES HAMILTON.

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# TRANSLATION

OF THE

# *HEDÂYA*

COMMENTARY

ON THE

# MUSSULMAN LAWS.

## BOOK XXXIX.

## Of *KISSMAT*, or *PARTITION*[*].

Chap. I. Introductory.
Chap. II. Of Things which are fit Objects of Partition.
Chap. III. Of the Mode of accompliſhing Partition.

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[*] Partition, in the *Muſſulman* law, applies to joint property in whatſoever manner obtained or acquired. It more immediately relates, indeed, to the diſtribution of inheritance: but as the *Muſſulman* doctors make no diſtinction, in terms, between a *partner* and a *parcener*, (co-inheritance being defined to be one mode of partnerſhip, Vol. II. p. 269.) the tranſlator uſes the terms *partner* and *partnerſhip* throughout.

rate of hire for his work.

the allowance from the public treaſury, he muſt at all events appoint a perſon who will make the partition for a certain rate of hire, to be paid by the parties who are concerned and particularly benefitted by the diviſion. In this caſe, the rate muſt be moderate and fixed, ſo that the partitioner may not be able to make exorbitant demands.—It is, however, more eligible that his allowances be paid from the public treaſury, as this is eaſier for the people in general, and precludes, in a greater degree, the imputations of corruption and injuſtice.

The partitioner muſt be juſt, and ſkilful;

THE partitioner muſt be a man noted for juſtice and integrity; and he muſt alſo poſſeſs a knowledge of that particular buſineſs.

but muſt not always be the ſame perſon.

THE magiſtrate muſt not compel the people always to accept of one particular perſon for their partitioner; becauſe the tranſaction which paſſes betwixt the partners and the partitioner is a ſpecies of contract; and it is not lawful to compel any perſon to enter into a contract;—and alſo, becauſe, if ſuch a practice were admitted, the perſon poſſeſſing the excluſive appointment would demand an immoderate rate of hire.

The partners may agree to a partition, procuring (if one be an infant) *an* order from the magiſtrate.

IT is lawful for ſeveral partners to agree amongſt themſelves, and to make a diviſion of their joint property. But if there be an *infant* among them, it is requiſite that they procure an order from the magiſtrate; for they poſſeſs no power over the infant.

One public partitioner cannot be concerned with another.

THE *Kázee* muſt not ſuffer the perſons employed in making partitions to be concerned together in the hire or profit ariſing from their buſineſs, ſuch a conjunction tending to raiſe the hire to an exorbitant rate; for each of them, when applied to, will make ſome excuſe for declining the employment, and they will refer the party who has occaſion for their ſervices from one to another, until at length he be conſtrained to conſent to immoderate terms;—whereas, if every man is concerned only for himſelf, each will readily conſent to be employed for a moderate hire, rather than loſe it altogether.

The parti-tioner is paid in proportion to the number of claimants.

THE rate of wages to a partitioner is regulated by the number of perſons for whom the diviſion is made, according to *Haneefa*. The two diſciples maintain that it is determined in proportion to their reſpective ſhares, the wages of the partitioner being on account of their property, and therefore determined according to its extent, like the wages of a public weigher, of a meaſurer, or of a perſon who digs a well to be held in joint property,—or like the maintenance of a ſlave belonging to ſeveral partners. The argument of *Haneefa* is, that the wages of the partitioner are given to him for diſcriminating and ſeparating the ſhares, in doing which it ſignifies not whether the ſhares be large or ſmall, ſince the ſhare of the inferior partner is diſtinguiſhed and ſevered by his work, as well as that of him who holds a large proportion. It moreover ſometimes happens that the labour in calculating a *ſmall* ſhare is more than in aſcertaining a *large* ſhare; and ſometimes the reverſe: hence it is difficult to determine how far the one or the other is attended with the moſt trouble; and therefore the hire muſt be referred to the mere act of *dividing off* or *diſcriminating*. It is otherwiſe in *digging a well*; for, in that inſtance, the wages are on account of digging and carrying away the earth, in which there is difference in the labour performed for each partner's proportion. With reſpect to *weighing* or *meaſuring*, if thoſe be performed in order to effect a partition of any thing, (ſuch as *wheat* held in partnerſhip,) it is affirmed by ſome that the ſame difference of opinion ſubſiſts betwixt *Haneefa* and the two diſciples:—but if they be performed merely to aſcertain the quantity of the whole, or for any other purpoſe than partition, the wages are then on account of the weighing or meaſuring, which is greater in the larger than in the ſmaller ſhare. There is alſo another opinion maintained upon the authority of *Haneefa*,—that the hire of the partitioner falls entirely upon the one who ſolicits the partition, and not on the one who has not ſolicited it, becauſe of its being advantageous to the one, but not to the other.

In the diſtribution of hereditaments, the magiſtrate muſt previouſly aſcertain the circumſtances:

but not if the property conſiſt of *moveables*;

nor in the caſe of property acquired by purchaſe;

When ſeveral co-partners appear before the *Kâzee*, and repreſent that a tenement or piece of ground which is in their poſſeſſion has devolved to them as the heirs of a certain perſon, the *Kâzee* muſt not make a partition of the houſe or ground until they have proved by witneſſes the death of the perſon, and the number of his heirs. This is according to *Haneefa*. The two diſciples ſay that if they all concur, the *Kâzee* may make the partition, taking care, however, to inſert in the *Kiſſmat Námma*, or deed of partition, that it was made in conſequence of their declarations. If, on the contrary, the joint property be *moveables* and not *lands* or *tenements*, and the parties repreſent that it is their inheritance, the *Kâzee* may, on their repreſentation, order the partition; or, if the joint property be lands or tenements, and they repreſent that they acquired it by *purchaſe*, the *Kâzee* may order a partition. The argument of the two diſciples is, that poſſeſſion is an apparent proof of property, and the concurrent declaration of all the parties with reſpect to their ſeveral claims is a proof of their veracity. Beſides, there is no perſon who either diſputes or denies their allegations; and where there is no denier the LAW requires no evidence. Hence the *Kâzee* muſt order the partition in the inſtance above-mentioned, as well as in caſes which relate to moveable property acquired by inheritance, or landed property acquired by purchaſe. It is requiſite, however, that he ſpecify, in the deed of partition, that it has been made in conſequence of their declarations, in order that his decree may extend only to thoſe who have attended, and not to others who may (perhaps) afterwards appear. The argument of *Haneefa* is, that the order which the *Kâzee* gives for the partition is in fact a decree againſt the defunct, by which his right is terminated; for until a partition take place, the hereditaments are ſtill conſidered as his eſtate, inſomuch that if any increaſe be produced upon it, ſuch increaſe is ſubject to the will of the deceaſed declared in his teſtament, or is appropriated to the payment of his debts, neither of which could be the caſe after partition has been made. The partition, therefore, being in fact a decree of the *Kázee* affecting the defunct, the concurrence of a part of the claimants to the ſuits of the others is not admitted as an argument of ſufficient weight; and hence they muſt ſupport their claims againſt the defunct by evidence; in which caſe a part of the heirs are conſidered as litigants on behalf of the defunct.

OBJECTION.—A part of the heirs cannot be conſidered as litigants on behalf of the defunct, ſince each individual acknowledges the claims of the others, and a man who acknowledges another's claim cannot be regarded as his opponent.

REPLY.—A part of the heirs may be conſidered as litigants on behalf of the defunct, although they do acknowledge the claims of the others, their acknowledgment being of no weight;—in the ſame manner as where a man ſues for a debt againſt an eſtate, and an heir or executor acknowledges his claim, in which caſe ſuch acknowledgment, as being to the detriment of the others, is not ſufficient, but the claimant muſt produce evidence before the *Kázee* in his ſuit, even againſt that heir or executor, before he can eſtabliſh his claim againſt the eſtate in general to the prejudice of the whole of the heirs. The acknowledgment of the heir or executor being therefore of no weight, he may, with propriety, be conſidered as an opponent or litigant.

—What is here mentioned is the law with reſpect to *immoveable* property*. It is otherwiſe with reſpect to *moveable* property †; becauſe that requires care in keeping, and there is an advantage ariſing from the immediate partition of it; whereas *im*moveable property, being by its nature ſafe, requires no care:—beſides, the perſon in whoſe poſſeſſion moveable property remains is reſponſible for it; whereas (according to *Haneefa*), he is not ſo with regard to *im*moveable property. It is alſo otherwiſe with reſpect to landed property acquired by *purchaſe*; becauſe an article ſold is no longer accounted the property of the ſeller, although it ſtill remain undivided; and the partition of it, therefore, cannot be regarded as a decree of the *Kázee*, paſſed againſt an abſent perſon, by which his right is terminated.

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* Arab. *Akkâr*; meaning *houſes*, *tenements*, &c. ſuch as is termed, in ourl aw, property.

† Arab. *Mankool*; comprehending every ſpecies of *perſonal* property.

nor in caſe of a partition being demanded without the parties ſpecifying the manner in which acquired.

If the joint owners of a property requeſt a partition of it, without ſpecifying whether it was acquired by inheritance, or by purchaſe, or by any other means, the *Kázee* may order the partition, this being, in fact, not a decree againſt another perſon, ſince no other is acknowledged by them. The author of this work ſays, that this adjudica- to be found in the *Kitáb al Kiſſmat* *.—It is mentioned in the *Jama Sagheer* that when two men apply for a partition of lands which they prove by witneſſes to be in their poſſeſſion, the *Kázee* muſt not order the partition until they alſo prove, by evidence, that the lands are their property; for otherwiſe it is poſſible that they may belong to another perſon. Some ſay that this is agreeable to the opinion of *Haneefa* alone:—but others aver that it is agreeable to the opinion of all the learned; and this is approved, ſince it is unneceſſary to order the partition of landed property in order to preſerve it. Beſides, the right of property being the ground on which partition is made, it cannot take place until that right be eſtabliſhed by evidence.

A partition may be granted on the requiſition and teſtimony of any two heirs; but an agent

Where two heirs appear, and produce evidence to prove the death of their anceſtor, and the number of his heirs, and the houſe or other inheritance is in their poſſeſſion, but one of the heirs is abſent,—in this caſe the *Kázee* may order a partition, if the heirs who attend require it, appointing an agent to take poſſeſſion of the portion abſentee; or if, under the ſame circumſtances, one of the

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* A collection of laws compiled by *Mohammed*, the diſciple of *Haneefa*.

heirs

pointed to the charge of the ſhares of the *abſent* or *infant* heirs;

heirs be an infant, the *Kázee* may order a partition, appointing a *guardian* to take poſſeſſion of his portion;—becauſe, in ſo doing, the intereſt of the infant or abſentee is promoted.—(But here likewiſe the production of evidence is indiſpenſable, according to *Haneefa*, in oppoſition to the opinion of the two diſciples, as before ſtated.) It would be otherwiſe if they had become proprietors of the houſe by *purchaſe*; for in that caſe no partition could be made in the abſence of any of the partners. This diſtinction between the caſe of property acquired by inheritance and property acquired by purchaſe is made on the following grounds.—An heir is maſter of his anceſtor's eſtate as his ſubſtitute, inſomuch that he has the power of returning (on diſcovering a defect) any thing which his anceſtor may have bought, or, in like manner, he may be compelled (on the diſcovery of a defect) to take back any thing which his anceſtor may have ſold; and he is likewiſe ſubject to become *deceived** in conſequence of the purchaſes of his anceſtor;—(that is to ſay, if the anceſtor purchaſe a female ſlave and die, and the heir afterwards have a ſon by her, and the ſlave then prove the property of another perſon, the ſon born of her is free, but the heir muſt pay the value of him to the proprietor of the ſlave, and he may again recover it from the perſon who ſold the ſlave, in the ſame manner as if he were the anceſtor who made the purchaſe.) One of the heirs, therefore, ſtands as litigant on behalf of the anceſtor, and the other is litigant on his *own* behalf; and the partition, under ſuch circumſtances, is in fact a decree paſſed in the preſence of both the parties. The purchaſer, on the contrary, becomes the proprietor of the thing bought by a recent title of property, and not in the manner of a ſubſtitute, inſomuch that he cannot, on diſcovering a defect, return the article to the perſon from whom the late ſeller had before bought it. Hence neither of the two preſent purchaſers can ſtand as litigant on behalf of an abſentee. Thus there is an evident difference between the two caſes.

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* Arab. *Mngroor*. The meaning of this term has been fully explained elſewhere.

it cannot — granted where the property, or any part of it, is held by an *abſent* heir, or his truſtee, or an infant.

If the land *, or a part of it, be in the poſſeſſion of the abſent heir, or of his truſtee, or in that of an infant heir, the partition muſt not be ordered, whether the heirs who are preſent produce the evidence or not. This is approved; for the partition, in ſuch a caſe, would in fact be a decree of the *Kâzee* againſt an abſentee, or an infant, diveſting them of ſomething they poſſeſs without any litigant appearing on their behalf;—nor can the truſtee of the abſentee ſtand as litigant on his behalf in any thing which may be attended with loſs to him;—and it is illegal in the *Kâzee* to paſs a decree without all the litigants being preſent.

If only *one* heir appear, a partition muſt not be ordered, although he produce the neceſſary evidence, for it is requiſite that both the litigants be preſent; and one man cannot ſtand as litigant on both ſides. It is otherwiſe where two appear, as has been already ſhewn.

The partition may be ordered although one of the requiring parties be an *infant*, or, one an infant heir, and the other a legatee.

If two heirs appear, one an adult, and the other an infant, the *Kâzee* muſt appoint a guardian to the infant, and order the partition as ſoon as evidence is produced; and in the ſame manner, if an adult heir appear, and alſo a legatee of one third of the eſtate, and they demand a partition, and produce evidence (one to prove that he is heir, and the other that he is legatee,) the *Kâzee* muſt order the partition; for in each of theſe caſes the litigating parties are both ſuppoſed to appear,—the adult heir being litigant on the part of the deceaſed, and the legatee on his own behalf,—and, in the ſame manner, the guardian being litigant on behalf of the infant,—whence it may be ſaid that the infant (as it were) has appeared in his own proper perſon as an adult, becauſe of the guardian being his ſubſtitute.

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* Arab. *Akkâr*; meaning *any* immoveable property; (and in this ſenſe is the term *land* to be underſtood throughout.)

# CHAP. II.

## Of Things which are fit Objects of Partition.

WHERE the reſpective ſhare of each of the partners is capable of being ſeparately converted to uſe, if any one of them demand a partition it muſt be granted; becauſe partition is an indiſputable right, when required in any article capable of partition, as has been before explained. If, on the contrary, the ſhare of one partner only be fit for uſe, and not that of the other, becauſe of its being extremely ſmall, and the owner of the greater ſhare demand a partition, the *Kázee* muſt grant it; but he muſt not grant it at the requiſition of the other partner; for as the former can reap a benefit from his ſhare, his demand is worthy of regard; but as the latter can have no other motives for his requiſition than malice, and a deſire of giving trouble, it is not to be attended to. *Khaſáf* holds the reverſe of this doctrine, "becauſe (ſays he) the *great* partner, in making his demand, occaſions an injury to another, whereas the *ſmall* partner, "in making his demand, ſubmits to his own injury."—*Hákim Shaheed*, on the other hand, mentions, in his abridgment, that "the "*Kázee* muſt order the partition at the requeſt of either of the partners; for the great partner is deſirous of enjoying the uſe of his "ſhare, and the ſmall partner voluntarily ſubmits to his own injury." The firſt of theſe opinions, however, is the moſt authentic.

An eſtate may be diſtributed on the requiſition of any one partner, whoſe ſhare ſeparately is capable of being converted to uſe.

IF the ſhares of each of the partners be ſo very ſmall that they would ſeparately be of no uſe, the *Kázee* muſt not order a partition unleſs both partners acquieſce; for whenever partition is compulſively

be ſeparately uſeleſs, the aſſent of a

ſively made, it is with a view to promote utility; but, in the preſent inſtance, all utility would be deſtroyed by it, and therefore it cannot take place without the conſent of both the partners, as they muſt neceſſarily be the beſt judges in a matter which concerns themſelves, and the *Kâzee* can only be guided by appearances.

A partition muſt be ordered where the property conſiſts of articles of one ſpecies, (not being *land* or *money*;)

WHEN the joint property is *Arooz*[*], (that is, neither *dirms*, *deenars*, *lands*, or *houſes*,) the *Kâzee* muſt order the partition, provided it [the property in queſtion] be all of one ſpecies, ſuch as articles of weight or meaſurement of capacity, or ſimilars of tale, or gold, ſilver, iron or copper, or *cattle* of one ſpecies, whether camels, oxen, or goats; for as, in this caſe, there can be no difference in the deſign, the partition may be effected with equity, and utility may thereby be accompliſhed.

but not where it conſiſts of *various* ſpecies,

THE *Kâzee* muſt not order a partition when the joint property is of various ſpecies, ſuch as a camel and a goat, or a houſe and an aſs; becauſe, as articles of different ſpecies cannot be indiſcriminately blended, the partition, in this inſtance, would not be a *ſeparation* and *diſtinction*, but rather an *exchange*, which muſt always be effected by a mutual concurrence of the parties, not by the decree of a magiſtrate.

or of houſehold veſſels.

A partition may be made of *cloth* of an equal quality;

THE *Kâzee* muſt not order a partition of houſehold veſſels, as thoſe are ſubject to the rule of diverſity of ſpecies, becauſe of difference of workmanſhip. He may make a partition of *Herat* cloths, as thoſe are all of one quality; but he muſt not make it of a ſingle piece of cloth which is not uniformly alike throughout, for the diviſion of one piece of cloth occaſions an injury, as it cannot be effected without cutting it; neither muſt he make a partition of two pieces of cloth where they are of unequal value. It is otherwiſe where there are three pieces, the value of one of which is equal to that of the other two; or where the value of one of them is one *dirm*, that of another one *dirm* and a quarter, and that of the third one *dirm* and three quarters; for, in the firſt caſe, he muſt give one piece to the one partner, and the other two to the other partner; and, in the ſecond caſe, he muſt give to one of the partners the ſecond piece, valued at one *dirm* and a quarter; to the other the third piece, valued at one *dirm* and three quarters, and muſt leave the firſt ſtill to be held in partnerſhip, one fourth appropriated to one partner, and three fourths to the other, as it is lawful to divide a *part* of a joint property, and to leave a part undivided.

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[*] Some lexicographers define *Arooz* to ſignify *houſehold furniture*. (*Sooràj-al-Loghàt*).

HANEEFA is of opinion that ſlaves and jewels muſt not be divided by the *Kâzee*, becauſe of the great difference which is to be found amongſt them. The two diſciples hold, that he may make a diviſion of ſlaves, for this reaſon, that they are of one ſpecies, like camels, or goats, or captives taken in war. The argument of *Haneefa* is, that among the individuals of the human ſpecies there is a wide difference, becauſe of their various characteriſtics; and hence ſlaves are, in effect, of *different* kinds. It is otherwiſe among animals, for with them there is little difference to be found betwixt the individuals of the ſame genus; and although the male and female of the human race be held as different ſpecies, yet the male and female amongſt animals are reckoned as the ſame ſpecies. It is alſo different with reſpect to ſlaves taken in war, as it is in their *value* that the captors hold a right, whence it is lawful for the Sultan to ſell them and make a diviſion of the price; whereas, in a caſe of *partnerſhip*, the right of the partners is connected with the *ſubſtance* of the article, as well as with the property it involves. Hence there is a difference betwixt plunder and partnerſhip property.—Some are of opinion that jewels cannot be divided when they are of different ſpecies, ſuch as pearls and rubies. Others ſay, that where the jewels are of *large* grains they cannot be divided, becauſe of the great difference that may be betwixt them; but not of but that when the grains are ſmall, the difference being inconſiderable, the jewels may be divided. Others, again, maintain that no jewels, whether of ſmall or large grains, can be divided, becauſe the difference betwixt them, and the difficulty of aſcertaining their value, is greater than in the caſe of ſlaves, inſomuch that if a man marry a woman, and in general terms ſtipulate to give pearls or rubies, as her dower, ſuch ſtipulation is invalid;—whereas, if he ſtipulate, in general terms, to give *ſlaves*, it is valid. The *Kâzee*, therefore, is not to exert his authority in making a partition of jewels.

Partition cannot be made of a *bath*, *mill*, or *well*, without the conſent of all the parties.

THE *Kâzee* muſt not order the partition of a joint mill, bath, or well, unleſs with the concurrence of all the partners; (and ſuch alſo is the rule with reſpect to a wall which ſtands betwixt two houſes;) for if, in theſe caſes, a partition were to take place, it would be injurious to all parties, as the individual ſhare of each would then be uſeleſs.

Partition of
id *te-*

IT is proper to remark, that a ſingle roofed place, ſurrounded with walls, with a door or entry, is termed a *Bait*, or *room*. A *Manzil*, or tenement, on the contrary, is a place compoſed of different rooms, a roofed court *, and a kitchen, ſuch as a man may reſide in with his family. A *Dâr*, or houſe, on the other hand, is a place conſiſting of various rooms or tenements, with an *open* court. A tenement is therefore ſuperior to a room and inferior to a houſe. Theſe are the definitions of *Shims-al-Ayma* in his book on *Shaffa*. In this work, whenever the general word *Khanna* [houſe] is uſed, we mean ſuch an one as we have now deſcribed, under the denomination of *Dâr*, excepting only where we mention an *under* houſe in contradiſtinction to an *upper* houſe, and then we only mean a *Bait* or a *Manzil*.

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* Arab. *Sahn*; meaning the interior ſquare of a dwelling, common to all the family, and which, in *large* edifices, is open, but in ſmall ones is covered in.

IF there be ſeveral houſes held in partnerſhip or coparcenary in one city, each houſe muſt be ſeparately divided according to *Haneefa.* The two diſciples ſay, that if it be expedient for the partners the whole of the houſes muſt be united in one general partition, and not divided ſeparately. All the houſes, therefore, muſt be conſidered merely as one houſe, conſiſting of various apartments, and all the ſhares of each partner muſt conſequently concentre in one of the houſes, ſo that it may be his entirely. The ſame difference of opinion alſo ſubſiſts regarding the caſe of lands held in partnerſhip or coparcenary, and diſperſed in different ſituations. The argument of the two diſciples is, that all the houſes are, on the one hand, of *one* ſpecies with reſpect to name, appearance, and original deſign; as, on the other hand, they are of *different* ſpecies with regard to their particular qualities, and their commodiouſneſs for habitation, which depends on ſize, and ſo forth; whence it muſt be left to the *Kazee* to determine their different degrees of ſuperiority.—The argument of *Haneefa* is, that regard ſhould be paid only to what they are in reality, with reſpect to their qualities; and that in them they may greatly differ on account of the difference of the cities, lanes, or neighbourhood, in which they are ſituated, and their proximity to or diſtance from water or a moſque; and that therefore it is impoſſible to obſerve an equality in the partition without dividing each houſe ſeparately;—whence it is that a man cannot appoint an agent to purchaſe a *houſe* in general terms;—and ſo likewiſe, that if a man marry, aſſigning as a dower "*a houſe,*" (in general terms) his mention of the houſe is invalid,—in the ſame manner as holds where a man aſſigns "cloths" (generally) as a dower, or appoints an agent to purchaſe "cloths."—It is otherwiſe with reſpect to a ſingle houſe, held in partnerſhip or coparcenary, compoſed of different rooms; for as, in ſuch caſe, to divide each room amongſt the co-partners would be productive of inconveniency to all, the whole houſe is therefore divided at once.

WHEN two houſes, held in partnerſhip, are ſituated in different towns, we learn from *Hillál* that it is the concurrent opinion of

*Haneeſa* and *Aboo Yooſaf* that both houſes ſhall be divided ſeparately. *Mohammed*, on the contrary, maintains that they muſt be divided at once, as well as the houſes ſituated in the ſame town.

Rooms, whether ſituated all in the ſame quarter, or in different quarters, muſt be divided at once, for the difference amongſt them is inconſiderable. *Manàzil Molàziká* (that is to ſay, adjoining tenements, or ſuch as are in the ſame houſe, one part of them being contiguous to another,) are conſidered as rooms; whereas, *Manàzil Mutbàyéná* (which is the term uſed for apartments not adjoining, in contradiſtinction to the other,) are conſidered as *houſes*,—a *Manzil* or tenement being the middle term betwixt a houſe and a room, and reſembling both.

If there be a partnerſhip in immoveable property of two ſpecies, ſuch as in a houſe and a piece of ground, or in a houſe and a ſhop, the *Kàzee* muſt divide each ſeparately, they being of different ſpecies.

## CHAP. III.

## Of the Mode of accompliſhing Partition.

The partitioner muſt draw a *plan*; and muſt make the diſtribution equitably by meaſurement or appraiſement.

It is incumbent upon the partitioner to draw on paper a plan of the thing which he divides, ſo that it may remain on his memory.—He muſt likewiſe obſerve an equality in the partition, that is to ſay, he muſt divide the article into due proportions; and it is alſo recorded that he ought to ſeparate each ſhare and meaſure it, ſo that its extent may be known. He muſt, moreover, *appraiſe* the article, as it is requiſite, for his further guidance, that the value be aſcertained. Suppoſing the article to be a *houſe*, in ſeparating the ſhares he muſt alſo ſeparate

Partition of *houſes* how accompliſhed.

the road and the drain belonging to it, if poſſible, ſo that one ſhare may no longer have any connection with the other, in order that every cauſe of diſpute may be terminated, and that the intention of partition may be completely accompliſhed. In doing this he muſt term one ſhare the *firſt* ſhare, that which lies next to it the *ſecond*, and that which lies next to it the *third* ſhare, and ſo on; and he muſt then write down their names, and draw them like lots; and he that draws the firſt name gets the firſt ſhare, he that draws the ſecond gets the ſecond ſhare, and ſo on to the end. The article muſt, moreover, be divided into fractions equal to the ſmalleſt proportion; that is to ſay, if the ſmalleſt proportion held by any of the partners or coparceners be a third, the whole muſt be divided into three parts; or if the ſmalleſt proportion be a ſixth, the whole muſt be divided into ſix parts; ſo that the diviſion may be made accurately. Thus, if an eſtate is to be divided betwixt two heirs, the one being the ſon and the other the daughter, it muſt be divided into three ſhares, one termed the *firſt*, the next to it the *ſecond*, and the next the *third*; and the partitioner is to write the names upon billets, and cauſe them to be drawn like lots; and if the *ſon*'s name come up firſt, he gets the firſt ſhare, and the one next to it, and the third goes to the daughter;—or, if the daughter's name come up firſt, ſhe gets the firſt ſhare, and the other two fall to the *ſon*.

THE drawing of lots is propoſed in order to give ſatisfaction to the parties, and to prevent the partitioner from being influenced by partiality or favour. It is not, however, abſolutely neceſſary; and if the partitioner chuſe to appoint a particular ſhare to each, it is valid; for the making the partition is an act of magiſtracy, and the authority of the partitioner muſt therefore be enforced.

**In the partition of landed property, a**

THE partitioner, in making a diviſion of landed property, muſt not annex a conſideration in *dirms* or *deenars* without the concurrence of the parties; that is to ſay, if he make one ſhare leſs than the not be admitted.

other, and, as a compenſation, annex to it a ſum in *dirms*, it is not valid, unleſs they conſent;—for the partnerſhip is not in *dirms*, and partition is one of the rights of the partnerſhip. Beſides, if *dirms* be admitted into the tranſaction, it deſtroys the equality of the partition; becauſe one of the partners gets the property, and is liable for the *dirms* which have become the right of the other; and there is a poſſibility that he may never pay them, by which means the other would loſe his right.

Partition of a houſe, with a piece of ground.

If the partnerſhip property conſiſt of two things, namely a houſe, and a piece of ground, each, according to *Aboo Yooſaf*, muſt be divided ſeparately, agreeably to its value; for it is only by aſcertaining the value of each that an equality can be obſerved in the partition. It is recorded from *Haneefa* that the ground may be divided agreeably to its meaſurement, and afterwards he on whoſe ſhare the houſe is ſituated, or whoſe ſhare is the moſt eligible, muſt pay a ſum in *dirms* to the other, ſo that an equality may be effected;—and that therefore *dirms* may be introduced as auxiliaries in the diviſion when neceſſity requires it. *Mohammed* in this caſe maintains that the perſon on whoſe ſhare the houſe is ſituated muſt give to the other partner a ſpace of ground equal in value to it. If, however, his ſhare (from its containing the houſe) be ſtill the moſt valuable, and it be impoſſible for him to effect an equality for want of enough of ground to compenſate for the value of his houſe, he may then give *dirms* equivalent to the exceſs; for as the neceſſity exiſts only in that degree, the original rule of *partition by meaſurement* muſt not in any greater degree be abandoned. This is conformable to the opinion delivered in the *Aſſil* [the *Mabſoot*].

Partition of land where there is a *road* or *drain*.

If the partitioner ſo divide the property, that the road or drain of one runs through the ſhare of the other, and no condition had been expreſſed regarding this matter, the caſe then admits of two predicaments.—I. It is poſſible for him to turn the road or drain another way, ſo that it paſs not through the ſhare of the other;—in which caſe the partition is valid;—for it is not proper that he let the road or drain of one man paſs through the ſhare of the other; on the contrary, it is incumbent on him to turn it another way, even though each individual may have mutually ſtipulated that they were to enjoy their reſpective ſhares "*with all the rights and immunities belonging to* "*them*;" becauſe the intention of *partition* is to ſeparate and diſcriminate the proportions of each partner; and as it is poſſible, in the preſent inſtance, without injury to either, to effect ſuch a ſeparation and diſcrimination completely, ſo as that no connection or dependance may remain betwixt the ſhares, this is therefore indiſpenſable.—It is otherwiſe with reſpect to lands ſold with an expreſs condition that "they are ſold with their *immunities*," for here, notwithſtanding the connection or dependance which may ſubſiſt betwixt them and the lands of another, the intention of *ſelling*, which is to transfer the right of property, is nevertheleſs fully accompliſhed.—II. It is (or may be) impoſſible to turn the road or drain another way, ſo that it paſs not through the ſhare of the other:—and this may happen under two different circumſtances:—FIRST, where the parties have not ſtipulated to one another the enjoyment of their ſhares "*with all the rights and* "*immunities belonging to them*;—in which caſe the partition muſt be annulled, on account of the connection and mixture of property, which renders it inefficient, the ends of partition (namely, ſeparation and diſcrimination) not being thoroughly accompliſhed;—the partition muſt therefore, in this inſtance, be made anew, in ſuch a manner, that the road and water-drain of each may be ſeparate. (It is otherwiſe with reſpect to lands ſold; for the object of a ſale is to tranſfer the right of property, which the purchaſer may fully poſſeſs without being able to enjoy immediately the uſe of it, whereas the intention of partition is that the uſe of the property may be enjoyed in the fulleſt degree, which it cannot be unleſs a ſeparate road be made.) —SECONDLY, where all the parties have ſtipulated that they ſhall enjoy their reſpective ſhares *with all the rights and immunities belonging* *to them*; in which caſe, the partition is valid, and the road and water-drain are included in it, ſince the end of partition is that each may enjoy the uſe of his property, and it is impoſſible perfectly to enjoy the uſe of the grounds without a road and water-drain. The road and water-drain are therefore, in this inſtance, included in the partition, provided the parties mutually ſtipulate to each other the enjoyment of their ſhares with all their reſpective rights: as, however, the object of partition is to *diſcriminate*, which requires a complete ſeparation of all connection in their reſpective ſhares, the road and water-drain are not included, unleſs ſuch a ſtipulation be particularly made. It is otherwiſe with reſpect to lands farmed; for the intention of *farming* being to enjoy the uſe of the lands, which cannot be done without having a road and water-drain, it follows that if theſe articles ſhould not have been expreſſed, they are nevertheleſs included in the farm.

In caſe of a diſpute concerning the road, it muſt be divided.

If the parties differ regarding the road, ſome of them deſiring that it ſhould remain, as formerly, in common, but that all the reſt of the property be divided, and others of them oppoſing this, in ſuch caſe, provided it be practicable, the magiſtrate muſt divide the road, and aſſign a part of it to each particular ſhare;—or, if this be impracticable, he muſt leave the road out of the partition, which muſt nevertheleſs be made, in order that the parties may enjoy the full uſe of all their property excepting the road.

If the parties differ regarding the extent of the road, (that is, regarding the height and breadth which ought to belong to each) the *Kâzee* muſt regulate their proportions by the breadth and height of the doors of their reſpective houſes, as that is ſufficient to anſwer their neceſſary occaſions. The advantage of this arrangement is, that if any of them be deſirous of making a projection or terrace from his houſe over the ſtreet he may do it *above* the height of his door, but not *below* it; and the road will ſtill remain in common, according to their ſeveral proportions, in the ſame manner as before the partition; for the partition (as we have obſerved above) did not take place regarding the *road.*

The parties may make a private agreement with regard to it.

IF two partners, in dividing a road, agree that the one ſhall have two thirds and the other only one third, ſuch a partition is valid, although the houſe be held betwixt them in equal proportions; for in partition it is lawful to give more or leſs than his proportion to one partner, provided both of them agree to this.

Complicated partition of different houſes and tenements.

IF two partners hold a houſe, the *upper* floor of which is held by a ſtranger, or which has no upper floor, and likewiſe another houſe, the under floor of which is held by a ſtranger, and alſo a complete houſe (that is, one of two ſtories), in this caſe the *Kázee* muſt appraiſe each houſe ſeparately, and make his diviſion accordingly. *Mohammed* alleges that this is the only lawful mode. *Aboo Yooſaf* and *Haneefa* are of opinion, that he ought to make the partition according to *meaſurement.* The argument of *Mohammed* is, that the lower floor has many advantages and conveniences which the upper floor cannot poſſeſs, ſuch as wells, neceſſary houſes, ſtables, and ſo forth; and that therefore the equality of partition cannot be effected but by an appraiſement. The argument of the two diſciples, on the other hand, is, that the partition, if poſſible, ought to be made by a meaſurement, ſince the partnerſhip ſubſiſts in a thing capable of meaſurement, and not in the value of that thing. They afterwards, however, differed regarding the mode of meaſurement; *Haneefa* contending that one ſpan of the lower floor ſhould be held equivalent to two ſpans of the upper floor; and *Aboo Yooſaf* maintaining that a ſpan of the one is equivalent to a ſpan of the other. Some have thought that the contradictory opinions of theſe three ſages ought to be aſcribed to their different places of abode, and the periods in which they lived; for during the time of *Haneefa* the inhabitants of *Kooſa* (the place of his reſidence) preferred the under floor to the upper; whereas afterwards, in the time of *Aboo Yooſaf*, the people of *Bagdad* (where he lived) held the upper and the under floor in equal eſtimation; and *Mohammed* obſerved that, on the contrary, the taſte of mankind differed, ſome preferring the upper and ſome the under floor, and others holding them in equal eſtimation. There are again ſome who, inſtead of aſcribing the opinions of the three ſages to the prevailing cuſtoms and notions of the ages and places in which they lived, are rather for deriving the origin from different principles of law. Thus, in ſupport of *Haneefa*'s doctrine, it is argued, that the advantages of an under floor are double thoſe of an upper one; for the advantages of the under floor remain after the upper one is ruined and deſtroyed, whereas thoſe of the upper floor do not remain after the deſtruction of the under one. In the under floor, moreover, there are not only the advantages of *habitation*, but alſo thoſe of *foundation*; for the proprietor of the under floor may build if he pleaſes, but the proprietor of the upper floor can only enjoy the advantages of habitation, as it is not lawful for him to erect any buildings without the conſent of the proprietor of the ground floor; and upon theſe conſiderations a ſpan of the *under* floor ſhould be reckoned equivalent to two ſpans of the *upper*. In favour of *Aboo Yooſaf*'s opinion, on the other hand, it is alleged, that *habitation* is the great end of both, and that both are equally fit to anſwer that end; whence it is lawful for the proprietor of either of them to erect any buildings that are not productive of injury to the other. Laſtly, it is urged, on the part of *Mohammed*, that the advantages of an upper and an under floor are according to the ſeaſons of ſummer or winter, the violence of the wind, the temperature of the air, and the different climates or countries in which they are ſituated; whence it is impoſſible to eſtabliſh any juſt rule of partition, but by appraiſement. In modern times the law is adminiſtered agreeable to the adjudication of *Mohammed*, which does not require any comment or elucidation.—The mode of partition preſcribed by the doctrine of *Haneefa*, in the caſe in queſtion, is as follows.—The partitioner muſt firſt ſet againſt the upper floor houſe (which we ſhall ſuppoſe meaſures one hundred ſpans) a part of the complete houſe equal to thirty-three one-third ſpans; becauſe an upper floor is rated at half the value of an under floor; conſequently thirty-three and one-third ſpans of the under floor of the complete houſe are equal to ſixty-ſix and two-thirds of the upper floored houſe; and as thoſe ſixty-ſix and two-thirds, together with the thirty-three and one-third ſpans of the under floor, form the complete houſe, the whole amount exactly to the one hundred ſpans of the upper floor houſe. The partitioner muſt then ſet ſixty-ſix and two-thirds ſpans of the complete houſe againſt the under floor houſe (ſuppoſing it to meaſure one hundred ſpans), for the upper floor of the complete houſe is rated at only half the value of the under floor houſe, and ſixty-ſix and two thirds ſpans of both the floors of the complete houſe are equal to the one hundred ſpans of the under floor houſe. The mode, on the other hand, of making the partition according to *Aboo Yooſaf*'s doctrine is as follows. Let one hundred ſpans of the upper floor houſe be ſet againſt fifty ſpans of the complete houſe; or, let one hundred ſpans of the under floor houſe be ſet againſt fifty ſpans of the complete houſe; for, according to him, the upper and the under floor are held in equal eſtimation; wherefore fifty ſpans of the complete houſe, comprehending fifty ſpans of the under floor, and fifty ſpans of upper floor, muſt be equal to one hundred ſpans.

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IF the partners differ after partition, one pleading that "he has not "received the whole of his ſhare, a part of it ſtill remaining in the poſſeſſion of the other,"—and the other denying this, and the two partitioners (or any other two perſons,) teſtify that "they have made a "partition," their evidence, according to the two diſciples, muſt be admitted. *Mohammed* ſays that it cannot be admitted, becauſe the evidence they give relates to their own act, and is conſequently inadmiſſible, in the ſame manner as the evidence of a man relative to ſome act of his own, on the occurrence of which a perſon may have formerly ſuſpended the emancipation of his ſlave. The argument of the two diſciples is, that the witneſſes, in fact, teſtify to the act of *others*, (namely, the act of *ſeizing* and *poſſeſſing*,) and not to their own act; becauſe their act was merely *diſcriminating* and *ſeparating*, to which evidence is not required; hence their teſtimony muſt be admitted. *Tahávee* obſerves, that where the partitioners receive pay for making the partition, it is univerſally allowed that their evidence cannot be admitted; and indeed ſeveral doctors of our ſect are of the ſame opinion; alleging that as, in that caſe, their evidence tends to prove that they have fully and accurately performed the work for which they received pay, it is in the nature of a repreſentation on their own behalf. Our author, however, does not ſubſcribe to this reaſoning; for he remarks, that the two partitioners could not have a view to their own intereſt in their evidence, as the partners have agreed that they fully and accurately performed the work of partition for which they receive their pay, the only queſtion in diſpute being the *ſeizin* and *poſſeſſion*; wherefore no imputation of falſehood ought to fall on them.—If only *one* partitioner give evidence, it muſt not be admitted; for the evidence of one man al[illegible] againſt another is not ſufficient.

but not that of one parti-

## CHAP. IV.

## Of Pleas of Error in Partition; and of Claims of Right in regard to it.

A plea of error cannot be admitted, where the party ac-

WHERE one of the partners complains of an error in the partition, and that a part which ought to have fallen to him by the partition is in the poſſeſſion of another, in this caſe, if he have before acknowledged that he had received his ſhare, his complaint muſt not be admitted unleſs ſupported by evidence; for it is, in fact, ſuing to cancel the partition after it has been accompliſhed; and it is to be preſumed that there is no error, and that his complaint is falſe. If the complainant cannot ſupport it by evidence, the others muſt be required to deny the complaint upon oath; and if they refuſe to ſwear, their refuſal is conſtrued as proof in favour of the complainant, and the *Kázee* muſt cauſe their property to be divided anew, agreeably to their ſeveral proportions, as this is dealing with them according to their own ſuſpicions. The author of this work thinks that in the above caſe the complainant's ſuit ſhould, on account of his contradicting himſelf, be wholly rejected.

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evidence.

If the complainant allege that he *did* receive his whole right, but that the other afterwards took a part of it, the denial of the other, on oath, muſt be credited, as this is in fact a complaint of *uſurpation.*

A complaint of after-aſſumption is a complaint of *uſurpation.*

If he allege that "a certain village fell to him in conſequence of "the partition, but that the other had not delivered it up to him," in this caſe, provided he have not previouſly acknowledged the obtaining poſſeſſion of his ſhare, and the other contradict him, both muſt be required to ſwear;—becauſe the diſpute is with reſpect to the quantity which the complainant received in conſequence of the partition; and hence the difference in the preſent inſtance is analogous to a diſpute concerning the quantity of an article of ſale,—in which caſe a mutual oath is tendered to the parties (as has been fully explained under the head of Sales;) and ſo here likewiſe.

In caſe of a complaint of non-delivery, both parties are ſworn, and the partition is diſſolved and made anew.

If one of the parties complain that an *error* took place in the diviſion, his complaint muſt not be attended to, it being held in the ſame light as a complaint of a fraudulent bargain, which in caſes of *ſales* concluded by the principals themſelves cannot be heard. In partition, therefore, as in *ſales*, ſince both parties have mutually con-

A plea of error cannot be heard, if the partition wa made by the parties.

curred, ſuch a complaint cannot be heard. If, however, the partition was made by the order of the *Kâzee*, and *extreme* fraud be alleged, the complaint muſt be heard, as the ſtability of the *Kâzee*'s authority depends on juſtice.

Caſe of a claim laid to a particular room in a houſe, after partition.

If a houſe be divided betwixt two partners, each receiving a part, and afterwards one of them claim a room in the poſſeſſion of the other, alleging, that "it is one of the things which ought to have "fallen to him in conſequence of the partition," and the other deny this,—in this caſe, as the plaintiff complains of *uſurpation*, it is requiſite that he bring proper evidence; and if both bring evidence, that adduced on the part of the plaintiff, who is *not* in poſſeſſion, muſt be admitted in preference to that of the other; for it is a maxim of the law that the evidence on the ſide of the party who is *out* of poſſeſſion is preferable to that on the ſide of him who is *in* poſſeſſion.

If the complaint above-mentioned be previous to an avowal of the plaintiff's having ever acquired poſſeſſion, both parties muſt be required to ſwear, and the partition muſt be annulled, and performed anew. In the ſame manner, alſo, if two partners differ regarding their boundaries, the one alleging that "a certain boundary belongs "to him, but has fallen into the poſſeſſion of the other," and the other alleging the ſame thing regarding another boundary, and both produce evidence, the *Kâzee* muſt decree, in favour of each, that boundary which is in the poſſeſſion of the other. If only *one* produce evidence, the *Kâzee* muſt paſs a decree only in his favour; but if neither of them produce evidence, they muſt both be required to ſwear, in the ſame manner as in caſes of ſale.

## SECTION.

### Of the Laws which prevail in a *Claim of Right* *.

IF a houſe (for inſtance) held in partnerſhip be divided, and afterwards an undefined part of the whole, (ſuch as a *half* or a *third*), prove the right of another, the partition, according to all our doctors, is null, and muſt be made anew.

In a caſe of claim ſet up to an indefinite ter partition, it muſt be diſſolved and made anew.

IF a particular and defined part of what has fallen to one of the partners, in conſequence of partition ſhould prove the right of another perſon, the partition is valid, according to all our doctors, and becomes not void with reſpect to what remains after the right of the other perſon has been ſeparated:—but the party from whoſe ſhare that right is taken has it in his option either to diſſolve the partition, (thereby reſtoring the property to the ſtate in which it ſtood previous to the partition) and then to demand a new one,—or, if he chuſe, he may let the partition hold good, and exact from his partner's ſhare a compenſation for that part of which he has been deprived by its proving the right of another.

If a part be claimed, after partition, it muſt be compenſated for from the ſhares of the other partners, or, the partition muſt be diſſolved and executed anew;

IF, after partition, an undefined part of the ſhare of one of the partners (ſuch as an *half*), prove the right of another perſon, the partition is valid with reſpect to the remainder, and does not become void according to *Haneefa* and *Mohammed*; but the partner upon whoſe ſhare the claim operates has it in his option to annul the partition;

and ſo likewiſe, if an *undefined* pa be claimed.

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* Arab. *Iſtihkâk*; meaning a claim ſet up to the ſubject of a deed or contract, by ſome perſon not concerned in ſuch deed or contract.

(reſtoring the concern to the ſtate in which it previouſly ſtood,) and then to demand a new partition;—or, if he chuſe, he may let the partition hold good, and exact from his partner a compenſation for the half of his ſhare which he has loſt, and which is equivalent to one fourth of the ſhare in that partner's poſſeſſion. According to *Aboo Yooſaf*, the partition is in this caſe null, ſince by an undefined proportion of one of their ſhares proving the right of another perſon, a third partner is created, without whoſe concurrence the partition is void;—in the ſame manner as where an undefined part of the *whole article* proves the right of another perſon. The reaſon of this is, that where an undefined proportion of one of their ſhares becomes the right of another, one of the objects of partition (namely, *ſeparation*) is deſtroyed, ſince the ſhare of one of the partners by that means becomes in itſelf a matter of partnerſhip; and he muſt have recourſe to the ſhare of the other for an undefined part, equal to that proportion of his right of which he has been deprived. It is otherwiſe in the preceding caſe, where a particular and defined part of one of their ſhares proves the right of another; for in that caſe the object of partition (namely, *ſeparation*) ſtill exiſts with reſpect to the remainder. The argument of *Haneefa* and *Mohammed* is, that the object of partition, namely ſeparation, is not defeated by an undefined proportion of one of the partner's ſhares becoming the right of another perſon. Hence a partition of this nature, *originally* made, would be valid;—as where, for inſtance, the firſt half of a houſe is jointly held by two partners, *Zeyd* and *Amroo*, and by a third perſon, named *Khàlid*, one half thereof by *Khàlid*, and the other half betwixt *Zeyd* and *Amroo*; the ſecond half being held jointly between *Zeyd* and *Amroo*, *Khàlid* holding no ſhare therein;—in which caſe *Zeyd* and *Amroo* might lawfully make a partition betwixt themſelves, *Zeyd* getting the whole of their joint ſhare in the firſt half of the houſe, and one-fourth of the ſecond half; and *Amroo* getting three fourths of the ſecond half; and it is in the ſame manner *ultimately* valid; the caſe becoming ſimilar to that in which a *defined* proportion of one of the ſhares proves the right of another. It is otherwiſe where an undefined proportion of the *whole* houſe, including *both* ſhares, proves the right of another; becauſe, in this latter caſe, ſuppoſing the partition to be valid, an injury is ſuſtained by the third perſon, whoſe right was manifeſted after the partition, ſince he muſt then accept his proportion, *not* in a *compact* manner, but *diſperſed*, from the ſhares of each of the others; whereas, in the former caſe, (in which an undefined proportion of one of the ſhares proves the right of another,) he ſuffers no injury. Thus there is an evident difference between the two caſes. In ſhort, the nature of the caſe in queſtion is this, that one of two partners takes one third of a houſe, and the other takes the remaining two thirds, the value of the firſt third being equal to that of the other two thirds; and afterwards one half of the firſt third proves the right of another perſon;—in which caſe, (according to *Haneefa* and *Mohammed*,) the firſt partner has it in his option to annul the partition; for if it continue valid, his ſhare is defective, becauſe of its being diſperſed, part in the *firſt* third of the houſe, and part in the two *laſt* thirds;—or, if he pleaſe, he may take one fourth of the ſhare which fell to the ſecond partner; for if the *whole* of his [the firſt partner's] ſhare had proved the right of a third perſon, he would have been entitled to take one half of the ſecond partner's ſhare; wherefore (arguing of a part from the whole) ſince one *half* of his ſhare proved the right of the third perſon, he is entitled to take one half of an half of the ſecond partner's ſhare, which is equal to one fourth.

IF the partner to whoſe lot the *firſt* half falls ſhould *ſell* a moiety of it, and afterwards the other moiety prove the right of another, he is ſtill entitled to one fourth of the *ſecond* half in the poſſeſſion of his co-partner, for the reaſons before aſſigned; and his option of annulling the partition drops, becauſe of his having ſold a part of his ſhare. This is according to *Haneefa* and *Mohammed*. *Aboo Yooſaf* maintains that the *ſecond* half, in the poſſeſſion of the co-partner.

ner, muſt be divided equally betwixt them; and that the firſt partner forfeits to his co-partner one half of the price for which he ſold a part of his ſhare; for (agreeably to his tenets) the original partition is invalid; and as an article of which a perſon obtains poſſeſſion by an invalid deed becomes his property, he may lawfully diſpoſe of it by ſale: but he is reſponſible for the value of it; and hence, in the caſe in queſtion, the firſt partner is reſponſible for the value of an half of what he has ſold, as that is a moiety of the other's half.

A debt proved againſt an eſtate, annuls

the heirs,

If the eſtate of a deceaſed perſon be divided amongſt the heirs, and afterwards a debt be proved againſt the eſtate *equal* to the whole, the partition muſt be annulled, becauſe the debt prevents the eſtate from being the property of the heirs;—and the ſame rule holds where the debt is *not* equal, becauſe the right of the creditor attaches equally to the whole fortune of the deceaſed. The partition muſt therefore be annulled, unleſs there be left after it a ſum ſufficient to diſcharge the debt, in which caſe it is not annulled, ſince the annulment of it is not neceſſary for the diſcharge of the debt.

unleſs the creditor remit it, or the heirs diſcharge it.

If the creditor, after the partition, remit the debt, or if the heirs diſcharge the debt from their own fortunes, the partition remains valid, whether the debt be equal to the eſtate or exceed it, the obſtacle to its validity being thus removed.

An heir may prefer a claim upon an eſtate after partition.

If one of the heirs prefer a claim of debt againſt the deceaſed, after the partition of the heriditaments, his claim is admiſſible; for in this caſe there is no contradiction, ſince the debt relates to the *ſpirit* or *value*, and not to the *ſubſtance* of the particular hereditaments, and it was in the *ſubſtance* of the hereditaments that the partition took place.

A claim cannot

If a part of the heirs, after partition, prefer a claim for a particular thing, included in the eſtate, on whatever ground the claim be built, it cannot be admitted, on account of the contradiction, which is here evident, as their acquieſcence in the partition implies an acknowledgment in them that that particular thing, which has been divided, was a part of the co-parcenary.

after
bution.

# CHAP. V.

## Of the Laws of *Mahàyat*.

*Partition of uſufruct.*

MAHAYAT, in the language of the LAW, ſignifies, *the partition of uſuf* ; and it is allowed; becauſe it is frequently impoſſible for all the partners to enjoy together, and at one time, the uſe of the thing held in partnerſhip. *Mahàyat*, therefore, reſembles the partition of property (whence it is that the *Kâzee* may enforce it in the ſame manner,)—with this difference, however, that in the partition of property each partner enjoys the uſe of his reſpective ſhare at the ſame time, whereas in the partition of uſufruct each moſt frequently enjoys the uſe of the thing held in partnerſhip only when it comes to his turn, by rotation. Partition of *property* is therefore more effectual than partition of *uſufruct* in accompliſhing the enjoyment of the uſe; for which reaſon, if one partner apply for a partition of property, and another for a partition of uſufruct, the *Kâzee* muſt grant the requeſt of the former; and if a partition of uſufruct ſhould have taken place with reſpect to a thing capable of a partition of property, (ſuch as a houſe or a piece of ground,) and afterwards one of the partners apply for a partition of property, the *Kâzee* muſt grant a partition of property and annul the partition of uſufruct.

and is not annulled by the deceaſe of the parties.

A PARTITION of uſufruct is not annulled by the death of one of two partners, nor even by the death of both, for if it were annulled, it muſt (moſt probably) be renewed, (ſince the heirs of the deceaſed may lawfully demand a partition of uſufruct,) and therefore it would be to no purpoſe to annul it.

Partners may make it by allotting to each the uſe of a *particular part* of the joint concern;

IF two partners, by a mutual contract, make a partition of uſufruct reſpecting a houſe, to this effect, that one of them ſhall inhabit one part of it and the other another,—or, that one ſhall inhabit the upper floor and the other the under, ſuch contract is valid; for as a partition of property executed in this manner is lawful, ſo likewiſe is a partition of uſufruct. It is proper to remark, that a partition of uſufruct, when thus executed, is in reality a *ſeparation*, that is, a diviſion of the whole of the ſhares of uſufruct of one partner from thoſe of another partner, and a concentration of both into one place: but the contract does not comprehend an *exchange*, whence it is that a limitation of time is not required in it;—for if it comprehended an exchange, a limitation of time would have been requiſite, becauſe of its being (in that caſe) a leaſe.

(in which caſe either is at liberty to *let* his ſhare;)

IT is lawful for each partner to let out on rent that part of which the uſufruct has fallen to him, and he may appropriate to himſelf the rent accruing therefrom, whether it be a condition in the agreement of partition of uſufruct or not; for every uſe which accrues from that part becomes (in conſequence of the partition of uſufruct) his property, and the rent which he receives is nothing more than a compenſation given him in lieu of the uſe accruing from it.

or by ſtipulating an *alternate* right to the uſe.

IF two partners make an agreement of partition of uſufruct regarding a ſlave, in this manner, that the one day he ſhall ſerve the one, and the next the other, it is lawful; (and ſo likewiſe if they make a ſimilar agreement regarding a ſmall room;) for partition of uſufruct is ſometimes effected by means of time, and ſometimes by means of place; and in the preſent inſtance it is effected by means of

IF two partners diſagree concerning the terms of their contract of partition, the one alleging that it related to *time*, and the other that it related to *place*, the *Kâzee* ought to enjoin them to agree regarding one or other of theſe methods. The reaſon of this is that the partition of uſufruct with reſpect to *place* is the more *equitable*, ſince by that means each partner enjoys the uſe at the ſame time that the other partner enjoys it alſo; but partition of uſufruct with reſpect to *time*, (on the other hand) is the more *complete in regard to the uſe*, ſince each individual then enjoys it entire. As, therefore, the reaſons in favour of theſe two methods are different, it is requiſite that the partners agree on one of them;—and if they chuſe partition with reſpect to *time*, the *Kâzee*, to prevent the imputation of partiality, muſt draw lots, in order to determine which of them ſhall have the firſt turn.

**A difference between the parties muſt be ſettled by the interference of the *Kâzee*.**

IF two partners (whom we ſhall ſuppoſe *Zeyd* and *Amroo*) make a partition of uſufruct regarding two ſlaves, to this effect, that the one ſhall ſerve *Zeyd*, and the other *Amroo*, it is valid, according to the two diſciples; for as (by their doctrine) partition of *property* with reſpect to ſlaves is lawful, whether performed by the authority of the *Kâzee*, or by the mutual agreement of the parties, it follows that partition of *uſufruct*, with reſpect to ſlaves, is alſo in the ſame manner lawful. Some (by inference from the doctrine of *Haneefa*) maintain that the *Kâzee* muſt not *enforce* the partition of uſufruct with reſpect to ſlaves; (and ſuch is reported as his opinion by *Khaſàf*;) becauſe compulſion being (as we have formerly ſhewn) diſallowed by *Haneefa* with reſpect to partition of *property* in the caſe of ſlaves, it evidently follows that the *Kâzee* cannot enforce a partition of *uſufruct* in a ſimilar caſe. The truth is, that if the *Kâzee* enforce a partition of *uſufruct* in this way, it is lawful, according to *Haneefa*,—

Caſe of partition of the uſe of *two* ſlaves, whereas, if he were in this way to enforce a partition of the *ſubſtance* it would be unlawful; becauſe in the *ſervice* of ſlaves there is no great difference, but in their *perſons* they differ conſiderably.

If a partition of uſufruct be made regarding the above two ſlaves in this manner, that the maintenance of the one whom *Zeyd* takes for his ſervice ſhall be defrayed by *Zeyd*, and the maintenance of the one whom *Amroo* takes ſhall be defrayed by *Amroo*, it is valid, on a favourable conſtruction. Analogy would ſuggeſt that it is not valid, becauſe the maintenance of each of the ſlaves is incumbent on both the maſters;—but when it is ſtipulated that the maintenance of one of them ſhall fall ſolely on one of the maſters, and that of the other on the other maſter, it may be called an *exchange*; and as the *conſideration* (ſuppoſing it an *exchange*) is uncertain, it is therefore invalid. The reaſon for a more favourable conſtruction, in this particular, is that in *feeding* ſlaves *ſtrictneſs* is not particularly regarded. It were otherwiſe, however, if each partner ſtipulated to *clothe* his ſlave, as ſtrictneſs is regarded with reſpect to *clothing* them.

or, of *two* houſes,

If two partners make a partition of uſufruct regarding two houſes; in this manner, that the one ſhall inhabit the one houſe, and the other inhabit the other, it is valid: and the *Kâzee* may enforce it, according to the two diſciples; and ſuch is alſo the opinion of *Haneefa*, as mentioned in the *Zâhir Rawâyet*. The reaſon of this, with the two diſciples, is that as (agreeably to their tenets) a partition of *property*, made in this manner, is valid, ſo likewiſe is a partition of *uſufruct*. Some ſay that according to *Haneefa* ſuch a partition of uſufruct, when made by the mutual agreement of the parties, is valid; but that it cannot be enforced by the *Kazee*; for although a partition of *property* of this nature, by the conſent of the parties, be valid, ſtill (agreeably to his tenets) the *Kâzee* cannot enforce it; and the ſame of a partition of *uſufruct*. There is another opinion tranſmitted to us from *Haneefa*, that a partition of uſufruct in the manner abovementioned

mentioned is utterly invalid, whether enforced by the *Kázee*, (for the reaſons which have been ſtated above,) or made by mutual agreement; becauſe it would be a ſale of reſidence in one houſe for reſidence in another, which is not legal, as has been already ſhewn in treating of HIRE. It is otherwiſe with reſpect to partition of the *ſubſtance* of two houſes; for the ſale of a part of the one houſe for a part of the other is lawful. The reaſons for the opinion quoted from the *Záhir Rawáyet* are, that as the difference between the uſufruct of the one and of the other is inconſiderable, a partition of the nature deſcribed is in the manner of a ſeparation, and is therefore lawful when made by the mutual agreement of the parties, and may be enforced by the *Kázee*. The difference, on the contrary, between the *ſubſtance* of the houſes may be very conſiderable; hence a partition of the *ſubſtance* of them, in the manner deſcribed, is (in effect) an *exchange*, and may accordingly be made by the conſent of the parties, but cannot be enforced by the *Kázee*.

**or, of two quadrupeds.**

IF a partition of uſufruct be made regarding two quadrupeds, to this effect, that the one partner ſhall have the riding of the one, and the other the riding of the other, it is not valid according to *Haneefa*. According to the two diſciples it is valid; ſince a partition of property made in this manner is (by their doctrine) valid; and partition of uſufruct is only a branch of partition of property. The argument of *Haneefa* is, that there is a difference in the uſe and riding of one or of another quadruped, becauſe of the difference in riders, ſome being expert and knowing in the art of riding, and others the reverſe. The ſame difference of opinion alſo obtains concerning a partition of uſufruct, by rotation, with reſpect to *one* quadruped:—in oppoſition to a *ſlave*; for a ſlave ſerves according to his own reaſon, and will not ſuffer a greater burden than he is capable of bearing, whereas a quadruped muſt ſubmit.

Partition of the advantage from a *houſe* may be effected by each party letting it to hire alternately,

If a partition be made regarding the produce of a houſe, to this effect, that the one partner ſhall let it out to rent for one or two months, and enjoy the produce or rent, and that afterwards the other partner ſhall let it out in the ſame manner, and enjoy the rent, ſuch a partition is valid, according to the *Zâhir Rawâyat:* but a ſimilar agreement regarding a ſlave or a quadruped is not valid. The reaſon of this diſtinction is, that in the caſe of the ſlave or quadruped the equality of the ſeveral ſhares, which is a neceſſary condition, is loſt,—whereas in the caſe of the houſe it is preſerved; for ſlaves and quadrupeds are changed and prejudiced by the lapſe of time and ſevere labour, and it is probable that their hire will be leſs the ſecond than it was the firſt turn, whereas a houſe may be ſuppoſed to continue in the ſame ſtate during both turns, and the rent may be equal.

any occaſional *exceſs* in the rent being divided equally be-them.

If it ſhould happen that the rent of a houſe is greater during the turn of one partner than in that of the other, they are both to participate in the exceſs, or difference betwixt the one rent and the other, ſo that an exact equality may be effected betwixt them. It is otherwiſe where they make a partition reſpecting the *uſe* of the houſe, and it afterwards yields a greater produce to the one in his turn than to the other, for as, in this caſe an equality has ſtill been preſerved in that which was the ſubject of partition, (namely, the *uſe*,) the exceſs of acquiſition, received in return for the *uſe*, is immaterial, ſince it frequently happens that there are two things exactly equal, and yet the return receiv'ed for the one is greater than that received for the other.

In a caſe of partition of the advantage from *two* houſes, neither party is accountable for any exceſs of rent to the other.

A partition concerning the rent of *two* houſes is likewiſe lawful, according to the *Zâhir Rawâyet*, for the ſame reaſons as have been aſſigned in the caſe of *one* houſe. If, however, one houſe yield a greater rent than the other, ſtill the partners do not both ſhare in the exceſs. The reaſon of this diſtinction is that, in the caſe of *two* houſes, when a partition of their rents is made, *ſeparation* is the prevailing principle; becauſe as each partner enjoys the rent of his particular houſe, at the ſame time, it follows that each obtains the whole of his reſpective rights, without leaving any part of them with the other,—whereas in a partition of the uſufruct of *one* houſe, the partners receive the rent by rotation, (that is, the one receives the rent the one month, and the other receives it the other,) and it may therefore be ſaid that they ſucceſſively grant to each other a *loan* of their ſhares of the rent,—the partner who holds the ſecond month lending to him who holds the firſt month his ſhare, or half of the rent for the *firſt* month, which he is again to receive out of the rent of the ſecond month;—and it may be alſo ſaid that during their reſpective months each acts as agent for the other in receiving his ſhare; and when the other has received his ſhare from the rent of the ſecond month, if there be an exceſs, it is divided betwixt them; but if, on the contrary, he be not able to recover the whole amount of his loan from the rent of the ſecond month, (it being leſs than the firſt,) the exceſs which is on the ſide of him who held the firſt month muſt be divided betwixt the partners, ſo that a perfect equality may be thus accompliſhed.

Caſe of partition of the advantage from two ſlaves.

ACCORDING to the two diſciples, a partition with reſpect to the *hire* of two ſlaves, made in the manner of the preceding caſe, is lawful, as well as a partition with reſpect to the *ſervice* and *uſe* of two ſlaves. *Haneefa* maintaining that it is not valid; becauſe the difference to be found in two ſlaves is greater than that which is to be found in *one* ſlave at two ſeparate periods. As, moreover, a partition with reſpect to the gain required from a *ſingle* ſlave, by rotation, is invalid, it follows that ſuch a partition with reſpect to the gain acquired from *two* ſlaves is invalid *a fortiori*. Beſides, a partition regarding the ſervice and uſe of ſlaves is admitted from *neceſſity*, ſlaves being of themſelves indiviſible; but there is no *neceſſity* in the caſe of the *hire* of ſlaves, as that is a thing which is capable of diviſion. In the caſe, moreover, of *ſervice*, it may not be requiſite to conſider matters ſtrictly;—whereas, in the caſe of *hire* (which is a *money* tranſaction) matters muſt be conſidered ſtrictly. Hence there is no analogy between the caſes.

A partition of advantage from two quadrupeds.

A PARTITION of uſufruct concerning the hire of two quadrupeds is invalid, according to *Haneefa*, in oppoſition to the two diſciples. The arguments uſed on both ſides are the ſame as thoſe which have been ſet forth in the caſe of a partition of uſufruct concerning the uſe or ſervice of a quadruped.

A partition of uſufruct cannot be made with regard to *productive* articles.

If two partners make a partition of uſufruct regarding an orchard of dates, or a garden containing trees, in this manner, that each ſhall take a part and cultivate it, and enjoy the fruits produced from it,—or, if they make a partition of uſufruct regarding a herd of goats, in this manner, that each ſhall take a certain number, and feed them, and enjoy the milk produced by them, neither of theſe partitions of uſufruct is valid; becauſe partition of uſufruct regarding *uſe*, as well as partition of uſufruct regarding *ſervice*, is admitted only from *neceſſity*, as being unſubſtantial and therefore incapable of diviſion; but, in the preſent inſtances, the fruit and the milk, when once produced, are capable of diviſion, being things which ſubſtantially exiſt, and therefore there is in theſe inſtances no neceſſity. The device here is for one of the partners to ſell his ſhare to the other, who may firſt enjoy the fruit and milk, and afterwards, when the other's turn is expired, his partner may again purchaſe the whole, and enjoy the fruit and milk in his turn. Or, one may enjoy the produce of the other's ſhare in the manner of a *loan*, and aſcertain the quantity thereof, for the loan of indefinite things is lawful.

# *H E D A Y A.*

## BOOK XL.

## *Of MOZÀREÁ, or* COMPACTS *of* CULTIVATION.

MOZÀREÁ, in the language of the LAW, ſignifies a compact betwixt two perſons, one being a proprietor of land, and the other the cultivator, by which it is agreed that whatever is produced from the land ſhall belong to both in ſuch proportions as may be therein determined.

Definition of the term.

A COMPACT of cultivation is not valid according to *Haneefa.* The two diſciples maintain it to be valid; becauſe it is related of the prophet that he entered into ſuch a compact with the people of *Kheeir*, by which it was agreed that they ſhould manage the gardens

Difference of [illegible] pacts [illegible] tivation.

and lands of *Khcebir*, and enjoy one half of the fruits and grain produced from them, and that they ſhould give the other half to him. Beſides, a compact of cultivation is, in fact, a compact of partnerſhip in regard to ſtock and labour, in this way, that one of the parties being the proprietor of the ground, and the other the tiller of it, the product is between them.—It is therefore valid from its analogy to a contract of *Mozáribat*; for contracts of *Mozáribat* are valid on a principle of conveniency; ſince, as it often happens that there are men poſſeſſed of property who have not a capacity for trade or buſineſs, and again, that there are others endowed with ſuch a capacity who have no property, it is therefore convenient that a contract of *Mozáribat* be eſtabliſhed betwixt them, by which means the deſires of both are accompliſhed; and as the ſame reaſon ſubſiſts in the caſe of compacts of cultivation, they are therefore valid as well as compacts of *Mozáribat*. It is otherwiſe where one man gives to another goats, fowls, or ſilk worms, to take care of, on condition that he who thus takes care of them ſhall have one half of the produce and the proprietor the other half; for this is diſapproved; becauſe as the care and management of the keeper has no effect in creating the produce, partnerſhip is therefore not ſufficiently eſtabliſhed in that inſtance. The arguments of *Haneefa* on this point are threefold. FIRST, The prophet has expreſsly prohibited *Mokhábera*, which in the dialect of *Medina* has the ſame ſignification as *Mozárea*, namely, compacts of cultivation.—SECONDLY, To make a compact of cultivation is to hire a labourer for a part of that thing which is produced by his labour: it is therefore, in effect, a *Kafeez Tehán*, and as that is unlawful, ſo likewiſe is this.—(*Tehán* ſignifies a miller or grinder of wheat, and *Kafeez* a cup uſed for meaſuring; *Kafeez Tehán* therefore means to hire a perſon to grind wheat into flour, in conſideration of a meaſure of the flour for his hire.)—THIRDLY, The rate of hire, in ſuch caſes, is uncertain, when any produce is reaped; or it is annihilated when no produce is reaped; and in either caſe the hire is invalid. With reſpect, moreover, to the tranſaction which paſſed betwixt the prophet and the people of *Kheebir*, it was not a compact of cultivation, but was rather in the nature of a tributary revenue, allowed to be paid in kind, as an indulgence or compromiſe. As compacts of cultivation are thus deemed invalid by *Haneefa*, it follows that, (agreeably to his doctrine,) where the labourer waters, tills, and ſows the land, and it nevertheleſs proves unproductive, he is entitled to the cuſtomary rate of hire adequate to his labour, ſince (according to *Haneefa*) the compact of cultivation is, in effect, as an *invalid hire*. This is where the ſeed ſown is furniſhed by the proprietor of the ground; for if the ſeed be furniſhed by the cultivator, he is liable for the rent of the land at the cuſtomary rate:—and if, in either caſe, any produce be reaped, it belongs to him who ſupplied the ſeed, ſince it is an increaſe from his property;—and the other, if he be the cultivator, is entitled to a rate of hire adequate to his labour,—or, if he be the proprietor of the ground, to an adequate rent for his ground. In the preſent times, however, the adjudication of the courts is given according to the doctrine of the two diſciples, both becauſe compacts of cultivation are convenient to mankind, and alſo becauſe they have become every where cuſtomary.

THE following conditions are eſſential to the validity of a compact of cultivation. I. That the ground be capable of cultivation, for otherwiſe the object of the compact cannot be accompliſhed.—II. That the proprietor of the ground and the manager be both qualified to make ſuch a compact; that is to ſay, that they be both in their right reaſon, of age, and converſant in ſuch compacts; for unleſs the parties be ſo qualified no compact whatever is valid. III. That the period or term be expreſſed; for ſuch a compact is in the nature of an agreement, either for the uſe of the *ground*, (as when the *cultivator* ſupplies the ſeed,) or, for the uſe of the *labour*, (as when the ſeed is ſupplied by the proprietor of the ground;) and the determinate uſe of either can be aſcertained only by the period. IV. That it be expreſsly ſtipulated by whom the ſeed is to be ſupplied, in order

They require

pable of cultivation,
that the parties be duly qualified,

that the term of their continuance be expreſſed,

that the party be ſpecified

that the grounds of the compact may be known;—in other words, in order that it may be known whether it is founded on the uſe of the *labour*, or on the uſe of the *land*, and that no ſource of diſpute may remain. V. That the particular ſhare which is to fall to him who does *not* ſupply the ſeeds be expreſſed; for in conſequence of the agreement he is entitled to a ſhare; and it is requiſite that the proportion be determined, becauſe a thing which is unknown cannot be eſtabliſhed by the compact, notwithſtanding a ſhare be in general terms ſtipulated. VI. That the proprietor of the land deliver up the land to the cultivator, in order to the cultivation of it; and that he himſelf abſtain from any management or enjoyment of it; inſomuch, that if it be ſtipulated in the compact of cultivation that he alſo ſhall manage, the compact is null, becauſe of the invalidity of ſuch ſtipulation. VII. That both parties participate in the produce of the ground after it is reaped; for a compact of cultivation is ultimately a compact of partnerſhip; wherefore every ſtipulation repugnant to partnerſhip invalidates the compact. (For example, if a preciſe quantity of the produce be ſtipulated for one of the parties, it is invalid; ſince, as it is uncertain whether ſo much will be produced, the partnerſhip is therefore defeated.) VIII. That the particular ſpecies of ſeed, ſuch as wheat, barley, &c. be expreſſed, in order that the ſpecies in which the hire of the labourer is to be paid may be known.

that the ſhare of the *other* party be expreſſed,

that the land be delivered up to the cultivator,

that both parties participate in the produce,

and that the particular ſeeds be mentioned.

Of compacts of cultivation four deſcriptions are valid,

COMPACTS of cultivation, (according to the two diſciples,) are of four different kinds:—I. Where the ground and the ſeed are ſupplied by the one, and the cattle, and the labour by the other:—and this is lawful, for the cattle are conſidered as implements of labour, and the caſe is therefore ſimilar to that of a man hiring a taylor to ſew his robe with his (the taylor's) own needle. II. Where the ground alone is ſupplied by one of the parties, and the labour, ſeed, and cattle by the other:—and this alſo is lawful; for in this caſe the labourer has hired the ground for a known proportion of its produce;

and it is therefore lawful, in the ſame manner as if he had hired or rented it for a certain number of *dirms*. III. Where the ground, the ſeed, and the cattle, are ſupplied by the one, and the labour alone by the other:—and this likewiſe is lawful; for in this caſe the proprietor of the ground hires a labourer to work with implements belonging to him (the hirer); and it is conſequently analogous to the caſe of a man hiring a taylor to ſew his robe with his (the hirer's) needle,—or, to that of a man hiring a labourer to dig with his (the hirer's) hoe. IV. Where the ground and cattle are ſupplied by one of the parties, and the ſeed and labour by the other.—This is not valid, according to the *Zâhir Rawâyet*:—but it is reported from *Aboo Yooſaf* that this alſo is valid; for as, if it were agreed that both the cattle and the ſeeds ſhould be ſupplied by the proprietor of the land, it would be valid, it is in the ſame manner valid where he ſupplies the cattle only; being, in fact, the ſame as where the cattle are furniſhed by the cultivator. The reaſons on which the opinion in the *Zâhir Rawâyet* is grounded are, that the uſe of *cattle* is different in its nature from the uſe of *ground*; for the uſe of ground ariſes from a ſtrength in the ſoil which occaſions vegetation, whereas the uſe of cattle conſiſts in their fitneſs for labour: theſe two things, therefore, not being of the ſame ſpecies, the uſe of the cattle cannot be a dependant on the uſe of the ground. It is otherwiſe where the cattle are ſupplied by the cultivator; for the uſe of cattle and the uſe of a cultivator or labourer are of the ſame ſpecies, the product being equally derived from the work of both.

and two are *in*valid.

It is here proper to remark, that beſides the four ſpecies of compacts of cultivation above enumerated, there are two more, which are, however, invalid. I. Where it is ſtipulated that the ſeed ſhall be ſupplied by one of the parties; and the ground, the labour, and the cattle, by the other; which is invalid, becauſe the *ſixth* condition before-mentioned is not found in it. II. Where it is ſtipulated that the ſeed and cattle ſhall be furniſhed by one of the parties, and the ground and labour by the other; which is likewiſe invalid, for the ſame reaſon. In both theſe caſes the produce of the land (according to the one opinion *), belongs to him who ſupplied the ſeed, upon the ſame principle that it belongs to him in any other caſes of compacts of cultivation which are invalid. But according to the other opinion †, the produce belongs to the proprietor of the land; and he therefore ſtands (as it were) as merely a *borrower* of the ſeed of which he has obtained poſſeſſion by its being ſown in his ground.

The period of their duration muſt be known, and the produce muſt be participated between the parties, in indefinite proportions.

Compacts of cultivation are not valid unleſs the period of their duration be known;—nor unleſs the produce of the land be indefinitely participated between the parties, (ſuch as in a *third*, a *fourth*, &c.) in order that partnerſhip may be eſtabliſhed betwixt them. If, therefore, it be ſtipulated that either of them in particular ſhall receive a certain number of meaſures of grain from the produce of the ground, the compact is null, as in this caſe partnerſhip is defeated, (in other words, is not eſtabliſhed,) ſince it is poſſible that no more may be produced from the ground than what is thus ſtipulated to one of the parties;—and the caſe is therefore ſimilar to that of two men concluding a contract of *Mozáribat*, in which it is ſtipulated that one of them ſhall receive a certain number of *dirms*.

In the ſame manner alſo, compacts of cultivation are invalid where it is ſtipulated that he who ſupplies the ſeed ſhall receive an equal quantity of grain from the produce of the ground, and that the reſt ſhall be divided betwixt the parties;—for, in caſe the produce exceed the quantity of ſeed, a ſtipulation of this nature defeats the partnerſhip with reſpect to that particular quantity; or, with reſpect to the *whole*, in caſe the produce ſhould *not* exceed the quantity of the ſeed. A ſtipulation of this nature, moreover, is ſimilar to where the parties agree, regarding tribute-land, that the reſt of the produce ſhall be divided after deducting the tribute. It is otherwiſe where two men agree that one tenth of the produce ſhall go to one of the parties, and that the remainder ſhall be divided betwixt both; for a ſtipulation of this nature does not defeat partnerſhip, becauſe the remaining nine-tenths ſtill continue participated between the parties; whence this is ſimilar to a ſtipulation, regarding tithe-lands, that "after deducting the "tithe, the remainder ſhall be divided betwixt the parties."

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* The opinion of *Haneefa*, as before ſtated.

† The opinion of the two diſciples.

In the ſame manner alſo, a compact of cultivation is invalid if it ſtipulate that whatever is produced on a particular ſpot, (ſuch as on the banks of a rivulet,) ſhall belong to one of the parties, and that the remainder of the produce of the whole ground ſhall be divided betwixt both; for ſuch a ſtipulation defeats partnerſhip, ſince it is poſſible that nothing may be produced except upon that particular ſpot:—and it is in like manner invalid where it is ſtipulated that the produce of one ſpot of ground ſhall go to one of the parties, and the produce of another ſpot to the other.

In the ſame manner alſo, a compact of cultivation is invalid where it is ſtipulated that the one ſhall get the ſtraw, and the other the grain; for it is poſſible that nothing may be produced but ſtraw: and it is equally invalid if it be ſtipulated tnat the ſtraw ſhall become their joint property, and that the grain ſhall belong to one of them only; for here a partnerſhip is not eſtabliſhed with reſpect to the *grain*, which is the particular object of cultivation.

If the

plies the ſeed;

If it be ſtipulated, in the compact of cultivation, that the grain ſhall be divided equally betwixt the parties, and no mention be made of the ſtraw, ſtill the compact is valid, becauſe a partnerſhip is ſtipulated in that thing which is the chief object of cultivation; and in this caſe the ſtraw will belong to him who ſupplied the ſeeds, as of that the ſtraw is the produce. (The *Shiekhs* of *Balkh** are of opinion that the ſtraw ſhould alſo be divided equally betwixt the parties; becauſe ſuch is the uſual practice when no mention is made of the ſtraw; and alſo becauſe as the ſtraw is ſubordinate to the grain, it ſhould, as well as the grain, be held in partnerſhip.)

and it may be *ſtipulated* to go to him; but it cannot be ſtipulated to go to the other.

If it be ſtipulated that the grain ſhall be divided equally, and that the ſtraw ſhall go to him who ſupplied the ſeed, it is valid; becauſe this is conſiſtent with the ſpirit of compacts of cultivation. If, on the contrary, it be ſtipulated that the ſtraw ſhall go to him who did *not* ſupply the ſeed, it is invalid, as ſuch a ſtipulation defeats the partnerſhip in caſe nothing but ſtraw ſhould be produced. The difference betwixt theſe two caſes is, that the perſon who did not ſupply the ſeed has no other claim to the ſtraw than what he acquires from the ſtipulation, whereas he who ſupplied the ſeed has a right to the ſtraw in conſequence of its being the produce of his ſeed; and whether the ſtraw be ſtipulated to him or not his right to it holds equally good.

The produce is participated according to agreement; and if *nothing* be produced, the cultivator has no claim.

When a compact of cultivation is valid, the produce of the ground is the joint property of the parties, in ſuch proportions as they may have ſtipulated, ſuch as an half, a third, or the like.—If, on the contrary, nothing be produced, the cultivator is not entitled to any thing; for he has a right only to a ſhare of what may be produced. It is otherwiſe where the compact of cultivation is invalid; for in that caſe an adequate hire falls due upon the *perſon* [of one of the parties,] not upon the *produce*; and the perſon is not abſolved by a failure of produce.

Where the compact proves inva-

When a compact of cultivation proves invalid, the crop belongs to him who furniſhed the ſeed, it being the produce of his property.

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* *Balkh* is a city in *Turan*.

Beſides, the other has no right therein except what he acquires in virtue of expreſs conditions in the compact; and where that proves invalid, it follows of courſe that the entire crop belongs to the perſon who ſupplied the ſeed.

lid, the produce goes to him who furniſhes the ſeed; and the other

If the ſeed be ſupplied by the proprietor of the ground, the cultivator is entitled to a ſuitable hire for his labour, provided it do not exceed what he would have received in conſequence of the conditions of the compact; becauſe, in ſubſcribing to theſe conditions, he conſented to relinquiſh his right to the exceſs. This is the law, as laid down by the two elders. *Mohammed* maintains that he is entitled to a ſuitable hire, to whatever amount; for as the maſter of the land has obtained his ſervices in conſequence of an invalid compact, he is of courſe liable for the *value* thereof, *ſervice* not being of the claſs of ſimilars;—as has been fully explained in treating of *Hire*.

if he be the cultivator, gets wages under the compact;)

If the ſeed be ſupplied by the cultivator, the proprietor of the ground is to receive a ſuitable rent for his ground, whether there be any produce or not. The reaſon of this is, that as the cultivator has acquired the uſe of the ground in conſequence of an invalid compact, he ought therefore to reſtore the uſe itſelf; but that being impoſſible, and there being no *ſimilar* in which he might make a return, it is therefore incumbent that he make a return in the *value* to an amount not exceeding what the other would have received in virtue of the ſtipulations of the compact. This is the doctrine of the two elders. *Mohammed* is of opinion that he muſt pay an equivalent whatever it may be.

or, if the proprietor of the ground, an adequate rent,

If the cattle be provided by the proprietor of the ground, ſo as that the compact, (according to the *Zâhir Rawâyet*,) becomes invalid, the cultivator is in that caſe liable for a ſuitable hire on account both of the cattle and the ground;—and this is certainly juſt; ſince the cattle are equally included in the contract of hire, (the compact

(and alſo an if ſupplied by him )

of cultivation being, in fact, a contract of hire in this inſtance;) and the uſe of the cattle and the uſe of the ground are uſes of different kinds.

If it be the [illegible] who [illegible] the [illegible] he [illegible] the whole; but if the *cul*[illegible] he [illegible] charity.

Where the proprietor of the ground, in conſequence of having ſupplied the ſeed, is entitled to the produce, he may lawfully, on the compact proving invalid, enjoy the *whole*, ſince it was yielded from ground which was his own property. If, on the contrary, the *cultivator*, in conſequence of having ſupplied the ſeed, be entitled to the produce, he is to reſerve for his own uſe a quantity equal to the ſeed he ſupplied, and alſo a quantity equivalent to the rent he is to pay to the proprietor of the ground,—and the reſt of the produce he muſt apply to charitable purpoſes; becauſe the produce ſprings from the ſeed, but grows out of the ground, whence his right to the uſe of the ground is invalid; and as invalidity in regard to the uſe occaſions a baſeneſs in regard to the product, it follows that what remains with him as a *return* is lawful to him, and that every thing elſe muſt be beſtowed in alms.

The party [illegible] to [illegible] re-tract previous to the ſowing;

Where two men enter into a compact of cultivation, and he who was to ſupply the ſeed afterwards retracts, previous to the ſowing, the *Kâzee* muſt not compel him to abide by the compact, becauſe he cannot abide by it without ſuſtaining an immediate loſs from the ſowing of his ſeed, and the caſe is therefore ſimilar to where a man hires another to break down his houſe, in which inſtance, if the hirer were to retract, the *Kâzee* could not compel him to abide by his agreement. If, on the contrary, the party retract who was *not* to ſupply the ſeed, the *Kâzee* may compel him to fulfil the compact; for in ſo doing he does not ſuſtain any loſs; and compacts of cultivation, like compacts of hire, are binding, unleſs when ſome plea can be alleged ſufficient to diſſolve compacts of hire, in which caſe a compact of cultivation is alſo diſſolved.

If the proprietor of the ground, being to furniſh the ſeed, ſhould retract, after the cultivator has tilled the ground, the cultivator is not entitled to receive any thing for the work he has performed. Some, however, are of opinion, that although, in point of law, there be no compenſation due to the cultivator, ſtill, in point of conſcience, it is incumbent on the proprietor of the ground to ſatisfy the cultivator for the work he has performed, as he has been *deceived* in this inſtance.

and if the

the cultivator is not entitled to any thing.

When one of the parties dies, the compact of cultivation, like compacts of hire, becomes diſſolved. (The reaſon of this is fully ſet forth in treating of *Hire.*)

The

of either party.

If a man give up a piece of ground to another for a term of three years, and afterwards, when the firſt year's crop has begun to grow, but is ſtill unfit for reaping, the man die, the ground, in this caſe, remains in the hands of the cultivator until the crop be fit for reaping, and the produce is then divided according to the conditions of the compact;—and the compact is diſſolved with reſpect to the remaining two years of the term; becauſe *analogy* would ſuggeſt that it diſcontinues even for the *firſt* year, as the duration of a compact depends on the duration of the parties; but it is continued throughout the *firſt* year, in order to the preſervation of the rights of both parties, (that is, the cultivator and the heirs of the proprietor,) ſince, if it were to diſcontinue, the cultivator would ſuſtain an injury. It is otherwiſe in regard to the *ſecond* and *third* years, becauſe in the diſcontinuance of the compact for thoſe years no injury is ſuſtained by the cultivator; and accordingly the compact is diſſolved for thoſe years, agreeably to analogy.

If the proprieto groun when the

the end of that year;

If the proprietor of the ground die after the cultivator has ploughed the land, and dug rivulets for watering it, but previous to the crop appearing, the compact is diſſolved, ſince in ſuch caſe the

but if he die *before* that, it is diſſolved immediately.

diſſolution of it is not injurious to the cultivator's property. (It is otherwiſe where the proprietor of the ground dies after the crop has begun to grow, and appears like graſs; for in that caſe the compact is not diſſolved, as the cultivator would then be injured in his property by the diſſolution of it.) In this caſe the cultivator is not entitled to any thing for his labour; becauſe the uſe of a perſon's ſervice cannot be appreciated but by a compact; and when the compact becomes null, the eſtimation of the ſervice no longer remains.

The proprietor of the ground may diſſolve the compacts with a view to ſell the ground for the diſcharge of his debts;

It is lawful for the proprietor of the ground to diſſolve the compact, in caſe he have occaſion to ſell the ground to diſcharge conſiderable debts which he may have incurred, for this is a pretext, which he may avail himſelf of, in the ſame manner as in *Hire* *:—and in this caſe the cultivator has no right to claim from him any expence which may have attended the tilling of the land, or the digging of drains; becauſe ſervice is not appreciable but in conſequence of a compact; and as the price ſet on the ſervice, in the preſent inſtance, was upon the ſuppoſition of a produce, it follows that upon the produce being prevented, the cultivator is not entitled to any thing. If, however, the crop have begun to grow, although it be ſtill unfit for reaping, the land muſt not be ſold for the payment of the proprietor's debts until the grain be ready to cut down; becauſe if the lands were to be ſold, under ſuch a circumſtance, the ſale would be injurious to the right of the cultivator; whereas, by waiting until the crop is ready, it only occaſions a ſmall delay in the payment of the proprietor's debts, which is the lighter evil of the two. The *Kázee* muſt alſo, in this caſe, enlarge the proprietor, if he have been impriſoned on account of his debts; for it being unlawful immediately to ſell the lands, the proprietor, in delaying to pay his debts, is guilty of no injuſtice, and impriſonment is intended as a retribution for injuſtice.

but if the crop be growing, the ſale muſt be delayed until it be ready for cutting.

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* See Vol. III. p. 369.

Rules in caſe of the compact expiring before the crop is ready to cut.

If the term of the compact of cultivation ſhould expire before the crop be ready for cutting, the cultivator muſt pay to the proprietor of the land a hire or rent for his [the cultivator's] proportion of the ground until the crop be ripe; and in the mean time any work which it may require muſt be performed by both parties according to their reſpective proportions. The reaſon of this is, that in thus prolonging the compact, and ordaining the payment of a rent, a regard is paid to the benefit and intereſt of both parties, wherefore it is neceſſary that it ſhould be prolonged:—and it is alſo neceſſary that both ſhould bear their proportions of the work or expences; becauſe the compact which they entered into is expired, and the crop remains their joint property, and in caſes of joint property the work is incumbent on both parties, in the ſame manner as the ſubſiſtence of a partnerſhip ſlave. (It is otherwiſe where the proprietor of the land dies whilſt the crop is yet green; for in that caſe it is incumbent on the cultivator to perform the whole of the work that may be required; becauſe in ſuch an event the compact is continued during the remainder of its term: and it [the compact] obliges the cultivator to ſuſtain the whole burden of the work;—whereas, in caſe of the term of the compact expiring, it is no longer binding, and therefore the cultivator alone is not obliged to perform the work.) If, therefore, either party incur any expence after the expiration of the term, without conſulting the other, or without an order from the *Kâzee*, he muſt bear it himſelf, as he had no right of himſelf to ſubject the other to any charges.

If, in the example above recited, the proprietor of the land ſhould be deſirous of taking the crop (which is ſtill green) after the expiration of the term of the compact, yet he muſt not be allowed to do ſo, becauſe it would be an injury to the cultivator. If, on the contrary, under the ſame circumſtance, the cultivator be deſirous of taking the green crop, the proprietor of the land has three things in his option; for he may either pull up the crop and divide it, or he may keep it altogether and make an allowance to the cultivator, equivalent to his ſhare of it; or he may take care of the crop until it be fit for reaping, in which caſe he may deduct from the ſhare of the cultivator the amount of the expence incurred on that account;—becauſe if the cultivator ſhould chuſe to deſiſt from labouring, on the expiration of the term of the compact, he cannot be compelled, ſince it is prolonged with a view to his benefit, which he himſelf has forſaken; and no injury is occaſioned to the proprietor of the ground, as he has three modes in his option, by either of which injury is prevented.

If the cultivator heirs continue the cultivation, but are not entitled to wages.

If the cultivator ſhould die after the crop has begun to grow, and his heirs ſhould offer to continue the cultivation until it be fit for reaping, and the proprietor of the land ſhould not conſent, in this caſe they are nevertheleſs authoriſed to continue the cultivation, as the proprietor will ſuſtain no injury thereby; but they are not entitled to any hire or wages, as the compact is continued with a view to their benefit. If, on the contrary, the heirs ſhould deſire to pull up the crop, and not to continue to cultivate, they cannot be compelled to continue to cultivate, for the reaſon above aſſigned; but the proprietor of the ground has in his option the three modes already recited.

The incidental charges are ſuſtained by the parties in proportion to their reſpective ſhares.

The expence of cutting down the crop, of carrying it to the ſtack, of thraſhing it, and of cleaning the grain from the ſtraw, falls upon both the parties in proportion to their ſeveral ſhares. If, therefore, they were to ſtipulate in the compact that the expences ſhall fall on only *one* of them, the compact would be invalid. In ſhort, all the above mentioned charges muſt be ſuſtained by both parties in proportion to their ſeveral ſhares, and not by any one of them in particular; becauſe, when the crop is ready, the object of the compact being accompliſhed, the compact itſelf is at an end; and as the crop remains the joint property of the parties, and no compact or ſtipulation is left in force betwixt them, it follows that any expences which may be afterwards required on account of their joint property ought to fall upon both. Beſides, if they ſtipulate that thoſe expences ſhall fall on one of them only, ſuch a ſtipulation is inconſiſtent with the true ſpirit of the compact, as it tends to the advantage of one party over the other; and all ſtipulations having ſuch a tendency invalidate the compact itſelf, in the ſame manner as a ſtipulation by which the cultivator is bound to *carry* the grain, or to *grind it into flour*. *Aboo Yooſaf* is, however, of opinion that where the parties agree that the operations above-mentioned ſhall fall upon the cultivator, it is lawful, becauſe of cuſtom. The ſages of *Balkh* concur in this opinion; and the *Shims-al-Ayma* obſerves, that this doctrine is authentic, and that the practice prevails in his country. In fine, every operation of agriculture, previous to the maturity of the crop, (ſuch as watering and watching it,) falls upon the cultivator; and every ſubſequent operation requiſite until the partition, (ſuch as reaping, &c.) falls equally upon both: and, laſtly, every operation that is neceſſary *after* the partition, (ſuch as carrying, watching, &c.) falls upon each of them ſeverally, for their reſpective ſhares.

General rules in compacts of cultivation,

THE foregoing rule holds good, alſo, in caſes of *Moſakát*, or compacts of gardening; that is to ſay, all operations previous to the maturity of the fruit, ſuch as watering, grafting, and watching the trees, fall upon the gardener; and all ſubſequent operations, ſuch as gathering the fruit, and watching it, previous to a partition, fall upon both. If, therefore, it be ſettled betwixt the parties that the trouble of gathering the fruits ſhall fall upon the gardener, it is diſapproved, according to all our doctors, as being uncuſtomary;—and all operations, after partition, muſt be performed by each with reſpect to his own ſhare.

and of gardening.

IF, in compacts of cultivation, the parties be deſirous of cutting down the crop whilſt it is young,—or, in compacts of gardening, of pulling the dates whilſt they are ſour or moiſt, the labour of theſe operations falls upon both, for the intention and deſire of performing them terminates the compact, in the ſame manner as if the crop or dates had arrived at maturity.

# *H E D A Y A.*

## BOOK XLI.

## *Of MOSAKAT,* or COMPACTS *of* GARDENING

Nature of a compact of gardening.

*MOSAKAT*, in the language of the law, ſignifies, a compact entered into by two men, by which it is agreed that the one ſhall deliver over to the other his fruit-trees, on condition that the other ſhall take care of them, and that whatever is produced ſhall belong to them both, in the proportions of one half, one third, or the like, as may be ſtipulated. *Haneefa* alleges, that a compact of gardening, ſtipulating an indefinite proportion of the produce, ſuch as an *half*, or a *third*, is invalid. *The two diſciples, on the contrary, maintain that it is valid, provided a term or period be expreſſed; and this is approved. It is to be obſerved, that compacts of gardening are frequently termed *Mämilat* as well as *Moſakât*; and the ſame laws hold with reſpect to them as thoſe which have been laid down with reſpect to compacts of cultivation.

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* Applying, more particularly, to the plantation and culture of *date* and other fruit-trees.

Doctrine of *Sha*, this

(Shafei is of opinion that compacts of gardening are valid; and that compacts of cultivation are only ſo, where they happen in ſubordination to the former; as, for example, where the fruit trees grow in fertile and clean ground, which is watered for the nouriſhment of the trees, and the proprietor of them directs the cultivator to ſow a crop on the ground on condition that he ſhall get a ſhare, ſuch as one half of the produce. The reaſon he aſſigns is, that the original thing, in this point, is a contract of *Mozâribat*; and to that a compact of gardening bears a nearer reſemblance than a compact of cultivation; for as, in compacts of gardening, the partnerſhip ſubſiſts in the *produce*, and not in the *principal* thing, (namely, the *trees*,) ſo in contracts of *Mozâribat* the partnerſhip ſubſiſts in the produce or profit, and not in the principal or ſtock;—whereas, in compacts of cultivation, if it be agreed that a partnerſhip ſhall exiſt in the produce, and not in the principal, (namely, the ſeed)—in other words, if the parties agree that the one who furniſhed the ſeed ſhall receive an equal quantity of ſeeds from the crop, and that the remainder ſhall belong to them both, the compact is invalid.—As, therefore, compacts of gardening bear a nearer reſemblance to *Mozâribat* than compacts of cultivation, it follows that they are the primary object, and that compacts of cultivation are lawful only as a dependant; like a right of drawing water, which cannot be ſold ſeparately, but is included, ſubordinately, in the ſale of the land; or like a *moveable* article, (ſuch as the furniture of a houſe,) which cannot be ſeparately appropriated in *Wakf*, but is included in the appropriation of the houſe or ground on which it ſtands*.)

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* It would appear that this opinion of *Shafei* is introduced merely for the purpoſe of elucidation, as it is not oppoſed to any different opinions, and his doctrines are ſeldom adduced in practice by the followers of *Alee*.

Analogy requires the ſpecification

The ſpecification of a term is requiſite in compacts of gardening, by analogy, in the ſame manner as in compacts of cultivation, the one being, in reality, a contract of *hire*, the ſame as the other. According to a more favourable conſtruction, however, compacts of gardening are lawful without any ſpecification of a term. Thus, if two men enter into a compact, by which it is agreed that the one ſhall deliver his date trees to the other, who ſhall water and nouriſh them until they produce fruit, and it become ripe, and no particular period (ſuch as a *year*, or the like) be ſpecified, the compact is nevertheleſs valid, and continues in force with reſpect to the firſt fruit that may be produced; for the ſeaſon for producing and ripening fruit is known, and ſeldom differs much. In the ſame manner alſo, if two men enter into a compact, and agree that the one ſhall deliver to the other the roots of ſhrubs, which are in the ground *, and that the other ſhall water and nouriſh them until they yield ripe ſeed, to be ſhared between them, without mentioning any term, the compact is nevertheleſs valid, and takes place, with reſpect to the firſt ſeed that ſhall be produced and arrive at maturity; becauſe as ſeed is of the ſame nature as fruit, the period of its maturity being equally known, it is, therefore, needleſs to ſettle any limited time. It is otherwiſe with regard to compacts of cultivation, which are invalid unleſs a period be ſettled; becauſe the time of commencing the cultivation differs greatly, ſome crops being ſown during the autumn, ſome during the winter, and others during the ſpring; and as there is thus a difference in the time of beginning the cultivation, the period of its ending cannot be known, for the ending depends on the beginning. It is alſo otherwiſe in caſes of gardening, where one man delivers to another his young trees newly planted; for in that caſe the compact is not valid unleſs a period be fixed, it being very uncertain when the trees may arrive at that ſtage in which they are capable of bearing fruit, as that is a circumſtance which depends on the

except where the trees are newly planted, ſtrength and fertility of the ſoil. It is alſo otherwiſe where a man delivers to another his date garden, or his herb roots, deſiring him to water and nouriſh them always until they die, or until their roots be pulled, and their vegetation be thereby terminated,—or where he ſets no bounds whatever to the duration of the compact with reſpect to the herbs; for in this caſe the compact is invalid, its period being uncertain, becauſe herbs grow as long as their roots are ſuffered to remain in the ground.

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* Meaning ſuch vegetables as renovate from the root every ſeaſon.

or, where the compact is declared to be for as long as the trees, &c. ſhall laſt.

If the parties, in a compact of gardening, ſettle a period during which it is certain that the trees cannot bear fruit, it is invalid; becauſe the object of ſuch a compact, which is a partnerſhip in the produce, is thus defeated.

The ſpecification of too ſhort a term invalidates the compact;

If the parties ſettle a period during which the trees *may* bear fruit, although they be frequently *later* in bearing, it is valid, becauſe the object of the compact is not to a certainty defeated in this inſtance. If, therefore, the trees bear fruit within the preſcribed term, it belongs to them both in the proportions which they may have previouſly ſettled; or, if they ſhould not yield fruit until after it is expired, the gardener is entitled to a ſuitable hire for his labour, becauſe the compact has in this caſe been rendered abortive by the error of the parties, in fixing a period too ſhort for the trees to yield fruit, and which invalidates the compact in the ſame manner as if it had been *known* to be too ſhort at the beginning. It is otherwiſe, however, if the trees afterwards yield *no* fruit; for in that caſe it is ſuppoſed owing to a *blight*, and not to the ſhortneſs of the period, that the compact proves abortive: the compact therefore holds good, and neither of the parties is entitled to receive any thing from the other.

but not where it is poſſible that the end of it may be anſwered within that period.

Compacts of gardening are lawful with reſpect to date trees, vines, &c. and alſo with reſpect to herbs and roots. According to the firſt opinion of *Shafeï*, they are lawful with reſpect to date-trees

reſpect to fruit-trees, vines, herbs, and roots.

and vines only; becauſe the validity of ſuch compacts is founded on the ſentence of the prophet regarding *Kheebir*, which is confined ſolely to theſe two. The argument of our doctors is, that the validity of ſuch compacts is founded on their utility, and conſequently is eſtabliſhed regarding other things as well as dates and vines;—and in anſwer to *Shafeï*, it is obſerved, that the ſentence of the KORAN regarding *Kheebir* does not admit of ſo confined a conſtruction; for the inhabitants of that country cultivated all kinds of trees and *herbs*.

The compact cannot be diſſolved by either party, but under ſome plea or pretext.

THE proprietor of the orchard cannot diſſolve the compact unleſs he have ſome plea for ſo doing, ſuch as when the claims of his creditors oblige him to ſell it. In the ſame manner alſo, the gardener cannot ceaſe to work, and thereby diſſolve the compact unleſs he adduce ſome plea, ſuch as ſickneſs. It is otherwiſe in compacts of cultivation; for (as has been already obſerved) in thoſe inſtances the party who ſupplies the ſeed is at liberty to diſſolve the compact at any time previous to the ſowing.

A compact may be entered into

is *green* but not after it is *ripe*.

IF two men enter into a compact of gardening, to this effect, that the one ſhall deliver over to the other his date orchard, at a time when

already appeared, but is ſtill very ſmall, and may, by watering and proper care, become full and large, it is valid;—whereas, if the fruit were arrived at perfection, and were incapable of further improved by care, it would be invalid. In the ſame manner alſo, if two men enter into a compact of cultivation, by which it is agreed, that the one ſhall deliver over to the other his crop, being yet green, and unfit for reaping, the compact is valid; whereas if the crop be fit for reaping it is invalid. The reaſon of this is, that the labourer is entitled to a ſhare of the produce on account of his labour; but if the compact were to hold good when his labour can have no effect, he would be entitled to a ſhare without labour, and this is not admitted in the LAW.

If the compact be invalid, the gardener wages.

When compacts of gardening are invalid, the gardener is entitled to ſuitable wages, as an invalid compact of gardening is equivalent to an invalid contract of hire, and therefore reſembles an invalid compact of cultivation.

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—Rules in caſe of the *proprietor* dying.

If, in a compact of gardening, one of the parties ſhould die, the compact becomes null, becauſe it is in reality a contract of hire.—If the owner of the orchard die whilſt the fruit is yet green, the gardener may continue to work as uſual until it be ripe, notwithſtanding the diſſent of the heirs.—(This proceeds upon a favourable conſtruction; for by continuing the compact, the gardener is prevented from ſuffering an injury, and none is occaſioned to the heirs.)—But if the gardener ſhould rather chuſe to ſubmit to the injury, the heirs have in that caſe three things at their option;—in other words, they may either divide the green fruit, agreeably to the proportion ſtipulated,—or, they may keep the whole of the green fruit, and pay to the gardener the value of his proportion,—or, laſtly, they may take care of the fruit until it be ripe, and expend ſuch ſums as may be neceſſary for that purpoſe, and afterwards recover a proportionable part of the expence from the ſhare of the gardener;—for the gardener is not at liberty to occaſion an injury to the heirs.

Rule in caſe of the gardener dying.

the gardener die, his heirs may continue to work, although the proprietor ſhould not conſent thereto, becauſe it tends to their mutual benefit. If, on the contrary, the heirs of the gardener decline working, and rather chuſe to gather the fruit whilſt it is ſtill green, the proprietor of the orchard has the three things in his option, as mentioned above.

Rule in caſe of
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If both the parties die, the heirs of the gardener may continue to work; for as, if the gardener had lived, and the proprietor of the orchard had died, he [the gardener] might have continued to work, it follows that his heirs, as being his ſubſtitutes, have the ſame thing in their option. If, however, they ſhould decline it, the heirs of the proprietor are in that caſe at liberty to purſue either of the three ways above mentioned.

Rules in caſe of the compact expiring whilſt the fruit is yet

If the term of the compact ſhould expire whilſt the fruit is ſtill green and unripe, the gardener may continue in his employment until it become ripe; and in this caſe he is not liable for any rent on account of the trees, the letting of trees being unlawful. It is otherwiſe with reſpect to compacts of cultivation; for if their term expire whilſt the crop is yet green, the cultivator may continue to work until it be fit for reaping,—but he is liable for the rent of the ground, the letting of ground being lawful.

If the term of a compact of gardening expire at a time when the fruit is ſtill green, the gardener alone is obliged to perform the reſt of the work; whereas, on the contrary, if the term of a compact of cultivation expire at a time when the crop is ſtill green, both parties are obliged to work until the crop be brought to maturity.—The reaſon of this diſtinction is that, in compacts of cultivation, the cultivator being liable for the rent of the ground after the expiration of the term of the compact, it would be unjuſt that he alone ſhould afterwards perform the labour; whereas, in caſes of compacts of gardening, the gardener, as not being liable for any rent, is obliged to perform the work alone, after the expiration of the term, in the ſame manner as before.

The compact may be diſſolved by any plea or pretext.

Compacts of gardening may be diſſolved by particular pleas,—ſuch as where the gardener is a thief, and there is reaſon to be apprehenſive of his ſtealing the branches or leaves of the date trees, or the fruit, before it is ripe,—or, where he [the gardener] is diſabled from working by ſickneſs.

—A queſtion has ariſen whether, if the gardener be deſirous of relinquiſhing his work, it is lawful for him ſo to do?—concerning which two opinions are recorded, ONE, that it is lawful; and ANOTHER, that it is not ſo.—This apparent difference may, however, be reconciled, by ſuppoſing that the former opinion alludes to caſes wherein it is ſtipulated that the gardener ſhall work *with his own hands*, which condition he is, by reaſon of ſickneſs, unable to fulfil.

If a man deliver to another a piece of open ground, for a certain number of years, that he may plant trees thereon, and ſtipulate that the trees and the ground ſhall be in partnerſhip between them, each holding an half,—it is invalid, for two reaſons; First, becauſe they have ſtipulated a partnerſhip in the ground, being a thing which already exiſts without the previous aid of the gardener's labour; and, Secondly, becauſe ſuch a compact is liable to the ſame objection as *Kafeez Tehân*; for in this inſtance the maſter of the orchard in effect hires the gardener, and ſettles, as his wages, a part of the thing produced by his labour, namely, one half of the trees.—In this caſe, therefore, the whole of the fruit and trees go to the maſter of the ground; and the gardener is entitled to the price of his trees, and alſo to an adequate conſideration as the hire of his labour; for as it is impoſſible to reſtore to him the trees, becauſe of their adheſion to the ground, he neceſſarily gets their value, and alſo an adequate hire;—nor is his hire included in what he receives for the trees; that is to ſay, they are *both* due, diſtinctly; the uſe of labour being in this caſe of itſelf capable of eſtimation.

A leaſe of open land, for planting, in con of the produce is invalid.

*HEDAYA.*

# HEDAYA.

## BOOK XLII.

## *Of* ZABBAH, *or the Slaying of Animals for Food*[*]

All animals killed for food, except fiſh and locuſts, muſt be in by *Zabbah.*

ALL animals, the fleſh of which is eatable, except fiſh and locuſts, are unlawful, unleſs they be ſlain by *Zabbah:*—but when ſlain by *Zabbah* they are lawful, as by means of *Zabbah* the unclean blood is ſeparated from the clean fleſh,—whence it is that all animals eatable, (ſuch as *rats*, *dogs*, or *cats*,) are rendered clean [†] by *Zabbah*, excepting only hogs and men.

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[*] The *Arabic* lexicographers define *Zabbah* to ſignify, in its literal ſenſe, the act of *cutting the throat*; in the language of the LAW it denotes the act of ſlaying an animal agreeably to the preſcribed forms, without which it is not conſidered as eatable.

[†] That is to ſay, their fleſh may be uſed in medical compoſitions; but ſtill it cannot be eaten as ordinary food.

Zabbah is of two kinds;—I. *Ikhtiàree*, or *of choice*, (that is, *voluntary*, or *at pleaſure*,) which is effected by cutting the throat above the breaſt;—and II. *Iztiràree*, or *of neceſſity*, (that is, *at random*, *from eſſity* ) which may be effected by a wound on any part of the ani- body.—The latter kind, however, is merely a ſubſtitute for the former, and accordingly is not of any account unleſs the former be impracticable, as the former is more effectual in extracting the blood: but the latter ſuffices where the other is impracticable; as mankind are required to act only according to their ability.

*Zabbah* is of two kinds, *by choice*, and *of neceſſity*.

It is one of the laws of *Zabbah* that the perſon who performs it be either a *Muſſulman* or a *Kitâbee*.—The *Zabbah* of a *Muſſulman* is therefore lawful; and ſo alſo the *Zabbah* of a *Kitâbee*, although he ſhould not be a ſubject of a *Muſſulman* ſtate,—provided, however, that it be done in the name of God, for in the Koran we find theſe words, "the victuals of *Kitâbees* are lawful to you."

It muſt be

or

The *Zabbah* is lawful provided the ſlayer be acquainted with the form of the *Taſmeeá*, or invocation in the name of God, the nature of *Zabbah*, and the method of cutting the veins of the animal; and it ſignifies not whether the perſon be a man or a woman, an infant or an ideot, a circumciſed perſon or an *un*circumciſed.

(provided he be a perſon acquainted with the form of invocation,) whether *man* or *woman*, *infant* or *ideot*.

An animal ſlain by a *Magian* is unlawful; becauſe the prophet has ſaid, "*Ye may deal with them as well as with* Kitabees; *but ye* "*muſt not marry their women, nor eat of animals ſlain by them*;"—and alſo, becauſe a *Magian* is a polytheiſt, and does not acknowledge the unity of God.

It cannot be

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The *Zabbah* performed by an *apoſtate* is unlawful; becauſe he is not permitted to continue in the faith to which he has turned, but muſt rather ſuffer death.—It is otherwiſe with reſpect to a *Kitâbee*; for if he change his religion, he is permitted (according to our doctors)

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to continue in that which he has adopted; and the law will ſtill conſider him, with reſpect to *Zabbah*, in the ſame light as the people of that faith which he has embraced.

or an idolater.

The *Zabbah* of an idolater is unlawful; becauſe he does not believe in the prophets.

Game ſlain in any place by a *Mohrim* is unlawful, or ſlain by any other perſon in holy ground.

Any ſpecies of *game* ſlain by a *Mohrim* * is unlawful, although it be not ſlain within the holy territory †:—and in the ſame manner, any game ſlain in the holy territory is unlawful, although the ſlayer be *not* a *Mohrim*. It is otherwiſe where a *Mohrim*, or any other perſon, ſlays an animal that is not game either in the holy territory or in any other place; for this is ſanctioned by the LAW, becauſe the holy territory affords no protection to goats, and the ſlaying of goats by a *rim* is not prohibited.

Rules with

invocation.

the ſlayer wilfully omit the *Taſmeeá*, or invocation "*in the* "*name of* God," the animal ‡ is carrion, and muſt not be eaten. If, however, he omit the invocation through *forgetfulneſs*, it is lawful. *Shafeï* is of opinion that the animal is lawful in either caſe.—*Mâlik*, on the contrary, maintains that it is unlawful in both; and that *Muſſulmans* and *Kitâbees* are conſidered as the ſame, with reſpect to the omiſſion of the invocation. The ſame difference is to be found in the opinions of our doctors concerning a man omitting the invocation on letting looſe a hound or a flying hawk at game, or when he ſhoots his arrow. The opinion of *Shafeï*, in this particular, is oppoſite to that of all our ſages; for, previous to his time, it was the univerſally allowed opinion, that an animal ſlain under a wilful omiſſion of the invocation was unlawful; the only point on which they differed being reſpecting the omiſſion of it from *forgetfulneſs*. The ſect of *Abdoola Ibn Omar* were of opinion that an animal ſlain under an omiſſion of the invocation from *forgetfulneſs* is alſo unlawful; whilſt, on the contrary, the ſects of *Alee* and *Ibn Abbas* deemed it lawful, but not under an omiſſion made *wilfully*.—Hence *Aboo Yooſaf* and the other *Haneefite* doctors have declared an animal ſlain under a *wilful* omiſſion of the invocation to be utterly unlawful; and that the *Kâzee* cannot authorize the ſale of meat ſo killed, it being contrary to the current opinions of all our doctors. The arguments of *Shafeï* on this point are twofold. FIRST, the prophet has ſaid, "*Let* MUSSULMANS *ſlay* "*in the name of* GOD, *whether they mention it with their tongues or* "*not*."—SECONDLY, If the invocation were eſſential to the legality of the animal, it could never be remitted on a plea of forgetfulneſs, any more than the purification eſſential to prayer.—Beſides, admitting the invocation to be eſſential, ſtill the *Muſſulman* faith is a ſubſtitute for it, in the ſame manner as in a caſe of omiſſion through forgetfulneſs. The arguments of our doctors, on the other hand, are threefold. FIRST, GOD has ſaid, in the KORAN, "EAT NOT ANY "THING OVER WHICH THE NAME OF GOD HAS NOT BEEN MEN-"TIONED."—SECONDLY, it is the univerſal opinion, as has been already remarked.—THIRDLY, the prophet has ſaid, regarding *Addee* the ſon of *Hâtim*, "*When thou haſt let looſe thy hound after game, and* "*repeated the name of* GOD, *thou mayeſt eat of that game*; *but if an-*"*other dog aſſiſt thine in killing the game, thou ſhalt not eat of it, be-*"*cauſe thou repeatedſt the name of* GOD *over thine own dog and not over* "*the other*:" it is therefore evident that the omiſſion of the name of GOD renders the game unlawful. The argument of *Mâlik* is founded upon a literal conſtruction of the paſſage of the KORAN, which we have quoted above, it not being particularly expreſſed therein that the *wilful* omiſſion is unlawful, and the omiſſion from *forgetfulneſs* lawful.

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* The appellation given to a pilgrim during his reſidence at *Mecca*.—It is alſo applied to any perſon who, having reſolved to undertake a pilgrimage, lays himſelf under particular reſtrictions.

† Arab. *Arzal haram*; the territory in the neighbourhood of *Mecca*, where no animal of the *game* ſpecies is ever put to death.

á, meaning (literally) *the creature ſlain*.

But the anſwer which we give to this argument is that the paſſage plainly alludes to an animal with reſpect to which the invocation has been *wilfully* omitted, the *letter* being here different from the *ſpirit* of the text, for if the ſpirit were according to the letter, the companions of the prophet (who hold the firſt rank in point of authority) would doubtleſs have drawn arguments from it, and the difference of opinion that is to be found amongſt them would not have exiſted. The anſwer to *Shafeï* is, that the analogy which he eſtabliſhes betwixt wilful omiſſion and omiſſion from forgetfulneſs, is not juſt; becauſe he that forgets acts under neceſſity, and the *Muſſulman* faith is admitted as a ſubſtitute in his behalf; whereas he who wilfully omits acts under no neceſſity.—With reſpect, moreover, to the ſaying of the prophet quoted by *Shafeï*, it evidently alludes to a caſe of omiſſion through forgetfulneſs.

In the *firſt* ſpecies of *Zabbah*, it muſt be pronounced whilſt the animal's throat is cutting;—and in ſpecies, upon ſhooting the arrow, or letting looſe the dog or hawk at the game.

It is a condition of *Ikhtiâree Zabbah*, that the invocation be pronounced over the animal at the time of ſlaying it,—whereas, in the caſe of *Zabbah Iztirâree*, (or of a man ſlaying an animal in hunting,) the condition is that the invocation be pronounced at the time of letting looſe the hound or hawk, or ſhooting the arrow, which is termed an invocation over the inſtrument. The reaſon of this diſtinction is, that in the firſt caſe the power of the man extends to the ſlaying; whereas in the ſecond it is confined to the act of letting looſe the hound or hawk, or of ſhooting the arrow, and does not extend to their reaching the animal; wherefore the invocation muſt be pronounced at the inſtant of ſuch act, which is in the power of the man.—Hence if a man throw a goat on its ſide, with an intention of ſlaying it, and then pronounce the invocation, and afterwards let that goat looſe, and then, without repeating the invocation, ſlay another, this is not admiſſible, and the meat is unlawful; whereas if a man ſhoot an arrow at an animal, and pronounce the invocation, and the arrow, inſtead of the one which he aimed at, hit another animal, it is lawful;—and the ſame law holds in the caſe of letting looſe a hound or hawk.—If the man, having thrown the animal on its ſide and pronounced the invocation, ſhould caſt away the knife from his hand and take up another, and with it ſlay the animal, it is lawful;—whereas if he pronounce the invocation over one arrow, and then take another and ſhoot the game with it, it is unlawful, the inſtrument over which the invocation was pronounced having been changed.

It is abominable to add any other thing to the name of God at the time of performing the *Zabbah*, ſuch as if a man were to ſay "O God, "accept this from me!"—This may occur in three different ſhapes; as, firſt, where he ſays any thing beſides the name of God, without pauſing between them, or making uſe of the conjunction "*and*," as in the example cited above,—or, where he ſays, *Biſm Illah, Mohammed Raſſool Illah*, "in the name of God, *Mohammed* is his prophet," which would be abominable, but the meat would not be unlawful;—ſecondly, where he ſays any thing *beſides* the name of God, without making a pauſe, but uſing the conjunction; as if he were to ſay, "*Biſm Illah wa Iſm Falàn*," "in the name of God and the name of "another;" or "*Biſm Illah wa Falàn*," "in the name of God and "another;"—in either of which caſes the animal ſlain is unlawful: and, thirdly, where he ſays any thing beſides the name of God, ſeparately, and by itſelf, either before or after the invocation, and the throwing down of the animal, which is of no conſequence, and does not render the meat unlawful, for it is related of the prophet, that he ſaid prayers immediately after performing *Zabbah*.

**Nothing muſt be ſaid except the invocation.**

It is a condition of *Zabbah* that nothing but the *invocation* be ſaid; that is, that no prayer or other matter be mentioned. If, therefore, a man, during the *Zabbah*, inſtead of "*Biſm Illah*," ("in the name "of God,") were to ſay, "*Illahoom agfar lée*," ("O God, forgive "me!") the animal ſlain is not lawful, as this is a *prayer* or *intreaty*. If, however, inſtead of "*Biſm Illah*," he ſay "*Alhumdolillàh*," 'praiſe be to God,") or "*Subhànillàh*," ("God is pureſt,") and this as an invocation, it is ſufficient. But if he ſneeze during the *Zabbah*, and exclaims "*Alhumdolillah!*" ("praiſe be to God!") it is not ſufficient, (according to the *Rawâyet-Saheeh*,) becauſe the exclamation will then be conſidered as *thanks*, and not as the *invocation*. The method which has frequently prevailed, of ſaying "*Biſm Illah oo Illah Akbâro*," ("in the name of God, and God is the higheſt,") during the *Zabbah*, is copied from *Ibn Abbas*.

ing animals.

place for ſlaying is betwixt the throat and the *libba*, [the head of the breaſt-bone,] becauſe the blood freely iſſues from a wound given in that place: the *Zabbah*, therefore, when performed any where within that ſpace, is lawful.

The veſſels which it is requiſite to cut in *Zabbah* are four; namely, the *Halkoom*, or wind-pipe; the *Mirree*, or gullet; and the *Wadijân*, or two jugular veins.—This is founded on a ſaying of the prophet. According to *Shafeï* it is ſufficient if *two* of theſe veſſels (namely, the wind-pipe and gullet) be cut. According to *Mâlik*, on the contrary, three of the four do not ſuffice, but it is requiſite that they be all cut. According to *Haneefa* the animal is lawful where three of the four veſſels are cut, which ever they may be. *Aboo Yooſaf* was alſo at firſt of this opinion; but he afterwards declared it indiſpenſably requiſite that the windpipe and gullet ſhould be cut, and one of the two blood-veſſels; becauſe as the effuſion of the blood is the deſign of cutting the blood-veſſels, one of them may ſerve as a ſubſtitute for the other;—but as the gullet and windpipe, on the contrary, anſwer two different purpoſes, (the one being the channel of food, and the other the channel of reſpiration, it is requiſite therefore that they be both cut, the one being unfit to ſtand in the place of the other. The argument of *Haneefa* is that the majority repreſents the whole in many rules of the LAW; and when three of the four veſſels are cut, the majority is cut, and the object (which is the ſpeedy effuſion of the blood and deprivation of life) is effected, ſince upon three of the above mentioned veſſels being cut, the animal cannot remain alive. If, therefore, to avoid giving additional pain, only three veſſels be cut, it is ſufficient.—It is otherwiſe where only *two* are cut; for as, in that caſe, a cutting of the majority, repreſenting a cutting of the *whole*, does not exiſt, it follows that the animal ſo ſlain is not lawful.—*Mohammed* is of opinion that the greater part of each of the four veſſels ſhould be cut, becauſe every one of them may be conſidered as a principal of itſelf, being ſeparated from the reſt. In the *Jama Sagheer*, alſo, he alleges that if one *half* of the wind-pipe, and one *half* of each of the blood-veſſels, be cut, the animal is not lawful; but that if the *greater part* of the wind-pipe, and the *greater part* of each of the blood-veſſels be cut, previous to the death of the animal, it is lawful;—and he has not made mention of any difference of opinion.

It may be performed with horns, or teeth, (detached from their native place,)

If a man ſlay an animal with nails, horns, or teeth, it may be eaten without apprehenſion, provided the nails, horns, or teeth, be detached from the place in which they grew. The act, however, is abominable *, becauſe it introduces the uſe of human members, and further, becauſe it is productive of too much pain to the animal, and we are directed to perform the *Zabbah* in ſuch a manner as may be moſt eaſy to it. *Shafeï* is of opinion that an animal ſlain in the above manner is unlawful, and carrion; becauſe the prophet has ſaid, "*the* ZABBAH *is lawful when performed with any thing that can draw blood, or cut the veſſels, excepting the teeth and the nails, which are the inſtruments of the* ABYSSINIANS †;" and alſo, becauſe it is a thing not allowed by the LAW any more than if the teeth or nails had been fixed in the place in which they grew. Our arguments, on the contrary, are that the prophet has ſaid "*Spill the blood with whatever thing it may pleaſe thee*;" and it is likewiſe related that he ſaid

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* The force of this term is explained in a note a little farther on. † are held in great contempt by the *Muſſulmans*.

“ *Cut the veſſels with what thing ſoever thou pleaſeſt.*” With reſpect to the ſaying quoted by *Shafeï*, it alludes to nails and teeth fixed in their native place; for it was a frequent cuſtom amongſt the *Abyſſinians* to ſlay cattle in that manner.—Nails, moreover, when removed from their place, are inſtruments for cutting; and the object of *Zabbah*, namely, the effuſion of the blood, may be accompliſhed with them, whence they are the ſame as a ſharp iron or ſtone. But when they are in their place they ſlay by means of the force or weight applied to them, and the animal ſo ſlain is, in effect, *ſtrangled.*

or with any ſharp inſtrument.

It is lawful to ſlay with the rind of a reed, with a ſharp ſtone, and with every thing that is ſharp and capable of cutting the veſſels and drawing the blood, excepting teeth and nails fixed in their native place.

Precautions to be obſerved by the ſlayer.

It is laudable in the ſlayer to ſharpen his knife; for the prophet has ſaid “ God *has enjoined us to be merciful to all: wherefore, when ye* “ *ſlay, let it be done in the moſt merciful manner*; *and when ye perform* “ *the* Zabbah, *let one of ye ſharpen your knife and do it in the eaſieſt* “ *manner for the animal.*”

It is abominable firſt to throw the animal down on its ſide, and then to ſharpen the knife; for it is related that the prophet once obſerving a man who had done ſo, ſaid to him, “ *How many deaths do* “ *you intend that this animal ſhould die?—Why did you not ſharpen your* “ *knife before you threw it down?*”

It is abominable to let the knife reach the ſpinal marrow, or to cut off the head of the animal. The meat, however, in either of theſe caſes, is lawful. The reaſons of the abomination in cutting into the ſpinal marrow are, First, becauſe the prophet has forbid this; and, Secondly, becauſe it unneceſſarily augments the pain of the animal, which is prohibited in our law.—In ſhort, every thing which unneceſſarily augments the pain of the animal in *Zabbah* is abominable.

is abominable to ſeize an animal deſtined for ſlaughter by the feet, and drag it to the place appointed for ſlaying it.

It is abominable to break the neck of the animal whilſt it is ſtill in the ſtruggles of death; but when the ſtruggles are over, it is not abominable to break the neck and ſtrip off the ſkin, for then it is inſenſible to pain.

If a man ſlay an animal by firſt cutting it in the back of the neck, doing it however in ſuch a manner as to cut the veſſels whilſt the animal is ſtill alive, the meat is lawful, becauſe the animal dies by *Zabbah:* but the act itſelf is abominable, as it unneceſſarily augments the pain of the animal, being in effect the ſame as if he had firſt wounded the animal, and afterwards cut its veſſels. If, on the contrary, the animal die previous to the cutting of the veſſels, the meat is not lawful, becauſe in this caſe the animal dies before the *Zabbah* has taken place.

**The animal is lawful although it be wounded previous to cutting its throat.**

In the caſe of all animals attached to man, and which do not fly from him, the *Zabbah* is performed by cutting the veſſels:—but in the caſe of thoſe which have become wild, and fly from him, the *Zabbah* is performed by chaſing and wounding them; becauſe where the *Zabbah Ikhtiàree*, or *Zabbah of choice*, is impracticable, there is occaſion for the *Zabbah Iztiràree*, or *Zabbah of neceſſity*; and there is ſuch an impracticability regarding the latter claſs of animals, but not regarding the former. The *Zabbah Iztiràree* is alſo lawful regarding an animal which has fallen into a well, provided the other ſort of *Zabbah* be impracticable.—*Mâlik* maintains that the meat is unlawful in both the foregoing caſes,—that is, in the caſe of a wild animal, and of one which falls into a well,—becauſe ſuch inſtances are rare. We, again,

**All *tame* animals muſt be**

**ting the throat; and *wild* animals by chaſing or ſhooting them.**

again, ſay that as the impracticability of the *Zabbah Ikhtiàree*, (which is allowed to be a valid argument,) exiſts in both theſe caſes; it follows that the ſubſtitute, namely, *Zabbah-Iztiràree*, may be adopted: nor is what he obſerves (that "ſuch inſtances are *rare*") admitted; on the contrary, they very frequently happen. In *Kadooree*, moreover, it is expreſsly ſaid that it is lawful to uſe the *Iztiràree Zabbah* towards all animals that fly from man;—and it is reported, from *Mohammed*, that if a goat become wild in the plains, the *Iztiràree Zàl* is lawful with reſpect to it; but if it become wild in the city, the *tiràree Zabbah* is not lawful, becauſe in the city it may be caught, and conſequently the *Ikhtiàree Zabbah* is not impracticable. With reſpect to cows and camels, however, the city and the plains are alike; becauſe theſe animals attack, with their horns or their teeth, any perſon that attempts to catch them; whence it is impoſſible to catch them, even though it be in the midſt of the city that they have become wild; and the *Ikhtiàree Zabbah* is therefore impracticable. When, alſo, theſe animals attack a man, they are conſidered as wild, provided it be not in his power to catch them; wherefore if one of them ſhould attack a man, and he with an intention of *Zabbah* kill it, the fleſh of it may be eaten lawfully.

Camels muſt be ſlain by *Nahr*, rather than by *Zabbah*.

THE moſt eligible method of ſlaying a camel is by *Nahr*, that is, ſpearing it in the hollow of the throat, near the breaſt-bone, becauſe this is agreeable to the *Sonna*, and alſo becauſe in that part of the throat the veſſels of a camel are combined. It is alſo lawful to ſlay it by *Zabbah*, although this be conſidered as abominable, ſince it differs from the *Sonna*. In regard to goats and oxen, it is moſt eligible to ſlay them by *Zabbah*, as being agreeable to the *Sonna*, and alſo becauſe the veſſels of a goat are aſſembled together in the upper part of the throat:—but they may alſo be ſpeared like a camel, although this method be not approved, as being contrary to the *Sonna*.

The fœtus of a ſlain animal

If a perſon, having ſlain a camel or cow, ſhould find a dead fœtus in the womb, ſuch fœtus is unlawful, whether it be covered with hair or not. This is the opinion of *Haneefa*; and it has been adopted by *Ziffer* and *Haſan bin Zeeyád.* The two diſciples maintain that if the fœtus be complete in its form, it is lawful; (and *Shafeï* concurs with them in this opinion;) becauſe the prophet has ordained the *Zabbah* of a fœtus to be the *Zabbah* of the mother; that is to ſay, the *Zabbah* of the mother anſwers for that of the fœtus likewiſe. Beſides, the fœtus is, in reality, a conſtituent part of the mother, as it is joined to her until ſeparated by a pair of ſciſſars or knife, ſubſiſts on the ſame food, and lives by the ſame breath;—and it is likewiſe conſidered as ſuch in law, inſomuch that it is included in the ſale of the mother, and is rendered free by the emancipation of the mother. The fœtus, therefore, being a conſtituent part of the mother, it follows that the *Zabbah* of the mother ſerves alſo for it, when a ſeparate *Zabbah* is impracticable, in the ſame manner as a wound in the caſe of game ſerves as a ſubſtitute for *Zabbah*. *Haneefa*, on the other hand, argues that a fœtus is complete with reſpect to life; that is to ſay, that it has a ſeparate exiſtence, inaſmuch as it may ſurvive after the death of the mother, whence it is that a ſeparate *Zabbah* is neceſſary, in caſe of its being alive. Moreover, if a perſon deſtroy a fœtus he is ſubject to a pecuniary penalty; and the owner of it may emancipate it alone, without including the mother. It is alſo lawful to bequeath it in legacy, or to leave a legacy to it. Beſides, the object of *Zabbah* is to ſeparate the blood from the fleſh; an object which cannot be accompliſhed, in the caſe of a fœtus, by the *Zabbah* of the mother alone. It is otherwiſe with reſpect to wounding game, as in that caſe the blood is ſeparated from the fleſh, and though it be in an imperfect manner, yet as any other mode is impracticable, it is therefore conſidered as *Zabbah*. A fœtus, moreover, is included in the ſale of the mother, becauſe the ſale would otherwiſe be invalid, and from this neceſſity it is included. And it is likewiſe rendered free by the manumiſſion of the mother, in order that a bond-infant may not be born from a freed-woman.

is not lawful.

## SECTION.

### *Of the Things which may lawfully be eaten, and of thoſe which may not.*

All beaſts and birds of prey are unlawful.

All quadrupeds that ſeize their prey with their teeth, and all birds which ſeize it with their talons, are unlawful, the prophet having prohibited mankind from eating them.—The reaſon of this prohibition is becauſe MAN is held particularly dear, and it is to guard him, leſt by eating of theſe animals their bad qualities might be communicated to him, and affect his diſpoſition.

Hyenas and foxes, being both included under the claſs of animals of prey, are both unlawful.—(*Shafeï* maintains that they are both lawful.)—Elephants and weaſels are alſo accounted animals of prey [*]: and pelicans and kites are abominable, becauſe they devour dead bodies.

Rooks are neuter: but carrion crows and ravens are unlawful. —Magpies, the crocodile, otter, all inſects, and the aſs and mule are unlawful. —Horſes.

Crows which feed on grain [rooks] are neuter [†]: but the crow of the wilderneſs [the *carrion* crow] and the raven, are not lawful.—According to *Haneefa* the magpie is neuter, like poultry; although it be ſaid (upon the authority of *Aboo Yooſaf*) that it is *abominated*, becauſe it frequently eats dead bodies.—The crocodile and the otter, waſps, and in general all inſects, are abominated. The aſs and the mule are unlawful, becauſe they are prohibited by the prophet.—The fleſh of horſes is held in abomination by *Haneefa* and *Mâlik*. According to the two diſciples and *Shafeï* it is neuter; for it is mentioned in the *Hadees Joäbir* that the prophet permitted it; and ſome are of opinion that the milk of mares is alſo neuter.—According to *Haneefa*, the fleſh of hares is neuter, becauſe the prophet eat it, and commanded his companions to eat of it.

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[*] Arab. *Zoo-Nâb*; meaning, literally, *creatures which have canine teeth*. The elephant (although certainly not a beaſt of *prey*) is perhaps claſſed with thoſe, becauſe of his tuſks.

[†] It is here proper to remark that, in the *Muſſulman* law, there are four gradations from legality to illegality. I. *Hilâl*, or poſitively *lawful*. II. *Mobâh*, or neuter: (that is, *indifferent*, and which may either be purſued or avoided.) III. *Makrooh*, or abominable: (that is, *reprobated*, but which is nevertheleſs lawful.) IV. *Hirâm*, or poſitively *unlawful:* (that is, *prohibited.*)

**Hares are neuter.**

The fleſh and ſkin of all unlawful animals become pure after they have been killed according to the laws of *Zabbah*, excepting only men and hogs.—According to *Shafeï* they do not become pure.

No animal that lives in water is lawful except fiſh. *Málik* and a number of other learned men are of opinion that all water animals are lawful. Others again ſay that ſea-dogs, ſea-hogs, and mair-men, are unlawful.

**No aquatic animal is lawful except fiſh.**

Fishes which, dying of themſelves, float upon the ſurface of the water are abominated. According to *Shafeï* and *Málik* they are neuter. The rule obſerved amongſt our ſect is this.—Fiſhes which are killed by any accident are lawful, like thoſe which are caught; whilſt, on the contrary, ſuch as die of themſelves without any accident are unlawful, like thoſe which are found floating on the ſurface of the water. There are, however, different opinions regarding ſuch as die of extreme heat or cold. Fiſhes and locuſts are lawful without being killed by *Zabbah*.

**Fiſh which periſh of themſelves are not lawful.**

# *HEDAYA.*

## BOOK XLIII.

## *Of UZHEEA, or SACRIFICE.*

**Sacrifice muſt be performed at the *Eed Kirbàn.***

IT is the duty every free *Muſſulman*, arrived at the age of maturity, to offer a ſacrifice on the *Eed Kirbàn*, or feſtival of the ſacrifice [*], provided he be then poſſeſſed of a *Niſáb* [†], and be not a traveller. This is the opinion of *Haneefa*, *Mohammed*, *Ziffer*, and *Haſan*; and likewiſe that of *Aboo Yooſaf*, according to one tradition.—According to another tradition, and alſo in the opinion of *Shafeï*, ſacrifice is not an indiſpenſable duty, but only *laudable*. *Tabâvee* reports that in the opinion of *Haneefa* it is indiſpenſable; whilſt the two diſciples hold it to be in a *ſtrong degree* laudable.

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[*] This feſtival happens on the tenth of *Zee-hidjá*, and was inſtituted in commemoration of *Abraham* having offered up his ſon *Iſhmael* as a ſacrifice to GOD, in conſequence of a viſion he had.—See *Sales's Korân*, Vol. II. p. 312.

[†] For the amount of *Niſáb*, ſee Vol. I. p. 1, to 27.

The offering of a ſacrifice is incumbent on a man on account of himſelf, and on account of his infant child. This is the opinion of *Haneefa* in one tradition. In another (which is recorded in the *Zâhir Rawâyet*) he has ſaid that it is not incumbent on a man to offer a ſacrifice for his child.—In fact, according to *Haneefa* and *Aboo Yooſaf*, a father or guardian are to offer a ſacrifice at the expence of the child, (where he is poſſeſſed of property,) eating what parts of it are eatable, and ſelling the remaining parts that are valuable in their ſubſtance, ſuch as the ſkin, &c. *Mohammed*, *Ziffer*, and *Shafei*, have ſaid that a father is to ſacrifice on account of his child at his own expence, and not at that of the child.

It is incumbent on a man, for himſelf, and for his infant children.

The ſacrifice eſtabliſhed for *one* perſon is a goat; and that for *ſeven*, a *cow* or a *camel*.—If a cow be ſacrificed for any number of people fewer than ſeven, it is lawful; but it is otherwiſe if ſacrificed on account of eight.—If, alſo, in an aſſociation of ſeven people, the contribution of any one of them ſhould be leſs than a ſeventh ſhare, the ſacrifice is not valid on the part of any.

The victi
fo
is
for any number from one to ſeven, a cow or camel.

If a camel that is jointly and in an equal degree the property of two men, ſhould be ſacrificed by them on their own account, it is lawful, according to the moſt authentic traditions:—and in this caſe they muſt divide the fleſh by weight, as fleſh is an article of weight. If, on the contrary, they diſtribute it from conjectural eſtimation, it is not lawful; unleſs they add to each ſhare of the fleſh part of the head, neck, and joints.

An animal held in joint property may
be
fe
fice.

If a perſon purchaſe a cow, with an intent to ſacrifice it on his own account, and he afterwards admit ſix others to an aſſociation with him

Others
be adn
to

an animal chaſed for ifice.

him in the ſacrifice, it is lawful.—It is, however, moſt adviſeable that he aſſociate with the others at the time of purchaſe, in order that the ſacrifice may be valid in the opinion of all our doctors; as otherwiſe there is a difference of opinion.—It is related, from *Haneefa*, that it is abominable to admit others to ſhare in a ſacrifice after purchaſing the animal; for, as the purchaſe was made with a view to devotion, the ſale of it is therefore an abomination.

It is not incumbent on the poor or travellers.

Sacrifice is not incumbent on either a *poor* man or a *traveller*; for *Aboo Bickir* and *Omar Farook* did not offer the ſacrifice of the *Eed* during their travels; and it is, moreover, related that *Alee* ſaid, “ *neither the prayers of Friday, nor the ſacrifice of the* Eed *are in*
“ *bent on travellers.*”

The time of performing

The time of the offering is on the morning of the day of the feſtival; but it is not lawful for the inhabitants of a city to begin the ſacrifice until their prieſt ſhall have finiſhed the occaſional prayers. Villagers, however, may begin after break of day. The place, in fact, muſt regulate the time. Thus, where the place of celebration is in the country, and the performers of it reſide in the city, it is lawful to begin in the morning: but if otherwiſe, it muſt be deferred until the prayers be ended.

If the victim be ſlain after the prayers of the moſque, and prior to thoſe offered at the place of ſacrifice, it is lawful; as is likewiſe the reverſe of this.

Sacrifice is lawful during three days,—that is, on the day of the feſtival, and on the two enſuing days.—*Shafei* is of opinion, that it is lawful on the *three* enſuing days. The ſacrifice of the day of the feſtival is, however, far ſuperior to any of the others. It is alſo lawful to ſacrifice on the *nights* of thoſe days, although it be conſidered as abominable.—Moreover, the offering of ſacrifices on theſe days is more laudable than the cuſtom of omitting them, and afterwards beſtowing an adequate ſum upon the poor.

If a perſon neglect the performance of the ſacrifice during the ſtated days, and have previouſly determined upon the offering of any particular goat, for inſtance; or, being poor, have purchaſed a goat for that purpoſe;—in either of theſe caſes it is incumbent on him to beſtow it alive in charity. But, if he be rich, it is in that caſe incumbent on him to beſtow, in charity, a ſum adequate to the price, whether he have purchaſed a goat with an intent to ſacrifice it, or not.

If the ſacrifice be delayed beyond the proper time, the victim muſt be

It is not lawful to ſacrifice animals that are blemiſhed,—ſuch as thoſe that are blind, or lame, or ſo lean as to have no marrow in their bones, or having a great part of their ears or tail cut off. Such, however, as have a great part of their ears or tail remaining may lawfully be ſacrificed.—Concerning the determination of a *great part* of any member, there are indeed various opinions reported from *Haneefa.*—In ſome animals he has determined it to be the *third*; in others *more* than the third; and in others, again, only the *fourth.*—In the opinion of the two diſciples, if more than the half ſhould remain, the ſacrifice is valid; and this opinion has been adopted by the learned *Aboo Lays.*

The of a *blemiſhed* animal is not admitted:

If an animal have loſt the third of its tail, or the third of its ear, or eye-ſight, it may be lawfully ſacrificed:—but if, in either of theſe caſes, it ſhould have loſt *more* than a third, the offering of it is not lawful.—The rule which our doctors have laid down to diſcover in what degree the eye-ſight is impaired, is as follows. The animal muſt firſt be deprived of its food for a day or two, that it may be rendered hungry; and having then covered the eye that is impaired, food muſt be gradually brought towards it, from a diſtance, until it indicate, by ſome emotion, that it has diſcovered it.—Having marked the particular ſpot at which it obſerved the food, and uncovered the weak

but a *trifling* blemiſh does not render it weak eye, the perfect eye muſt then be bound, and the ſame proceſs carried on, until it indicate that it has obſerved it with the defective eye. If then the particular diſtance from thoſe parts to where the animal ſtood be meaſured, it may be known, from the proportion they bear to each other, in what degree the ſight is impaired.

An animal wanting a horn, or *mad*, or *caſtrated*, may be ſacrificed.

If a perſon ſacrifice an animal without a horn, it is lawful;—and ſo likewiſe where the horn is broken, or where the animal is mad or caſtrated.—Many, however, have ſaid, that it is not lawful to ſacrifice a mad animal, unleſs it eat food, in the ſame manner as it is not lawful to ſacrifice a *Gurgeen* [the offspring of a wolf and goat] unleſs it be fat. With regard to animals that want teeth, it is reported from *Aboo Yooſaf* that they may be lawfully ſacrificed, provided they be able to chew,—or (according to another report) provided the greateſt of their teeth be remaining. Animals, however, that are born without an ear cannot lawfully be ſacrificed. What is here ſaid reſpects ſuch blemiſhes as may have exiſted in the animal, previous to the purchaſe of it; for if it be perfect at the time of purchaſe, and afterwards contract ſuch a blemiſh as to render the ſacrifice of it unlawful, and the proprietor be rich, it is in that caſe incumbent on him to ſacrifice another; whereas, if he be poor, he may lawfully ſacrifice the ſame. The reaſon of this is, that as an offering is incumbent on a rich man originally, and not on account of his purchaſe, the animal therefore which he buys is not particularly ſet aſide for the offering; whereas, on the contrary, an offering not being incumbent on a poor man, except when he purchaſes an animal with that intent, the animal ſo purchaſed is therefore particularly deſtined for the purpoſe:—and accordingly, our doctors hold that if an animal, purchaſed with a view to be offered, ſhould die, it is incumbent on the proprietor, if he be rich, to ſubſtitute another, but not if he be poor;—or, if the animal be either loſt or ſtolen, and the purchaſer, having bought another, ſhould then recover the firſt, in ſuch caſe it is incumbent on the proprietor, if he be rich, to ſacrifice one of them, whether it be the firſt bought or the ſecond; but if he be poor, he is under an obligation to ſacrifice both.

Any accident [illegible] ing it does not invalidate the ſacrifice.

If it ſhould happen that the goat, having been turned over in order that the ſacrifice might be performed, in the ſtruggle breaks one of its legs, in that caſe, provided the ſacrifice be immediately made, it is lawful and ſufficient. So alſo, it is lawful, if the animal, in that ſituation, having received any hurt, ſhould run away, and having been immediately and without delay taken, ſhould then be ſacrificed. *Mohammed* has likewiſe judged the ſacrifice lawful, if, in this caſe, the animal ſhould not be retaken until after ſome delay:—in oppoſition to the opinion of *Aboo Yooſaf*.

Goats, camels, and cows alone are lawful in ſacrifice.

It is not lawful to offer a ſacrifice of any animal except a camel, a cow, or a goat; for it is not recorded that the prophet or any of his companions ever ſacrificed others. Buffaloes, however, are lawful, as being of the ſpecies of a cow. Every animal of a *mixed* breed, moreover, is conſidered as of the ſame ſpecies with the mother.

Age at which [illegible] ar [illegible] fi [illegible] fice.

The ſacrifice is lawful of any animal of the three ſpecies above mentioned, although it be only a *Soonee**: but not if younger; excepting, however, a ſheep, which may be ſacrificed when a *Judday*, or ſo young as to have no teeth; and in this caſe our doctors have made it a condition that the ſheep be of large ſtature, inſomuch as to have the appearance of a *Soonee* at a little diſtance. The period of *Judday* in ſheep (according to our doctors) is at the expiration of ſix months, and the commencement of the ſeventh. The time of *Soonee* in goats or ſheep is at the age of one year; in cows, at the age of two; and in camels at the age of five years.

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* The ſheep and the goat are held to be of the ſame ſpecies.

If one of ſeven joint ſacrificers die, the conſent of his heirs is iſite to the ſacrifice.

If ſeven perſons purchaſe a cow for ſacrifice, and one of them afterwards die, and his heirs deſire the other ſix to ſacrifice a on account of themſelves, and on account of the dead, it is lawful; whereas, if they ſacrifice it without the conſent of the heirs it is not lawful.

If a Chriſtian, or any perſon whoſe object is the fleſh, and not the ſacrifice, be a ſharer with ſix others, the ſacrifice is not lawful on the part of any.

Rules with reſpect to the diſpoſal of the

It is lawful for a perſon, who offers a ſacrifice, either to eat the fleſh, or to beſtow it on whomſoever he pleaſes, whether rich or poor: and he may alſo lay it up

It is moſt adviſable that the third part of the fleſh of a ſacrifice be beſtowed in charity.

It is lawful either to beſtow the ſkin of a ſacrifice in charity, or to make any utenſil of it, ſuch as a bucket, ſieve, or the like. It is likewiſe lawful to barter it for any unconſumable article that yields profit in its ſubſtance:—but it is not allowable to barter it for any thing *conſumable*, as vinegar, and ſuch like. Fleſh, in theſe reſpects, is conſidered in the ſame light as the ſkin, according to the moſt authentic traditions.

If the fleſh of a ſacrifice be ſold along with the ſkin of it for money, or for any thing that is not profitable but in conſumption, it is incumbent on the ſeller to devote the price to the poor; and the ſale is valid.

It is not lawful to give a part of the ſacrifice in payment to the

It is abominable to take the wool of the victim and ſell it before the ſacrifice be performed; but not after the ſacrifice. In the ſame manner, it is abominable to milk the victim and ſell the milk.

It is moſt adviſeable that the perſon who offers the ſacrifice ſhould himſelf perform it, provided he be well acquainted with the method; but if he ſhould not be expert at it, it is then adviſeable that he take the aſſiſtance of another, and be preſent at the operation.

It muſt ſlain by ſacrificer in his preſence.

It is abominable to commit the ſlaying of the victim to a *Kitábee*. If, however, a perſon order a *Kitábee* to ſlay his victim, it is lawful. It is otherwiſe where a perſon orders a *Magian*, or worſhipper of fire, to ſlay his victim, for this is inadmiſſible.

A *Kitâbee* may be employed to ſlay it, but not a *Magian*.

If two perſons commit a miſtake, each ſlaying the offering of the other, it is lawful; and no compenſation is on that account due from either. If, alſo, having erred in this manner, they ſhould eat the fleſh, and then diſcover the miſtake, in this caſe it is requiſite that they ſanctify the act of each other, and ſacrifice is then fulfilled. If, on the contrary, they refuſe to do ſo, and diſpute the matter, each is in that caſe entitled to take a compenſation for the value of the fleſh of his offering from the other, and muſt then beſtow ſuch compenſation in alms, as it is a return for the fleſh of his offering: and the ſame rule alſo obtains where a perſon *deſtroys* the fleſh of the offering of another.

Two perſons ſlaying each other's victim by miſtake muſt make a mutual compenſation.

If a perſon uſurp a goat, and ſacrifice it, he is in that caſe bound to compenſate for its value, and his offering is thereby rendered

Caſe of ſacrifice of an *uſurped* animal.

valid; becauſe upon paying the compenſation he is held to have been proprietor of the goat from the time of his having uſurped it. It is otherwiſe where a perſon ſacrifices a goat committed to him as a depoſit; for this is not valid; becauſe he is obliged to compenſate for it (not on account of the *animal*, but) on account of the *ſacrifice*, and hence his property in it is not eſtabliſhed until after he has ſacrificed it.

# *HEDAYA.*

## BOOK XLIV.

## *Of KIRAHEEAT, or ABOMINATIONS.*

Difference of opinions concerning the extent of the term *Makrooh*.

THE author of the *Hedáya* remarks that our doctors have diſagreed concerning the extent in which the term *Makrooh* * is to be received.—*Mohammed* was of opinion that every thing *Makrooh* is unlawful; but as he could not draw any convincing argument from the ſacred writings in favour of this opinion, he renounced the general application of *unlawfulneſs* with reſpect to ſuch articles, and claſſed them under the particular deſcription of *Makrooh*, or abominable.—It is recorded, on the other hand, from *Haneefa* and *Aboo Yooſaf*, that *Makrooh* applies to any thing which, in its qualities, nearly approaches to *unlawful*, without being *actually* ſo.—This article is comprehended under a variety of heads or ſections.

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* *Makrooh* is the participle paſſive of *Kurihá*, to *abominate*; this word is frequently taken in a milder ſenſe; and may relate to any thing *improper* or *unbecoming*.

## SECT. I.

## *Of* EATING *and* DRINKING.

It is abominable to eat the fleſh or to drink the *aſs*, or to take the urine of a *camel*, unleſs medicinally;

HANEEFA has ſaid that the fleſh and milk of an aſs, and the urine of a camel, are abominable.—According to *Aboo Yooſaf* the urine of a camel may be taken as a medicine; but with reſpect to milk, it is a ſecretion from the blood, and is therefore ſubject to the ſame rule with the fleſh of the animal from which it is produced.

or to uſe veſſels of *gold* or [illegible]r.

IT is not allowable, either to men or women, to uſe a veſſel of gold or ſilver in eating, drinking, or in keeping perfumes; becauſe the prophet has ſaid, with reſpect to any perſon who drinks out of a veſſel of ſilver or gold, that "*the fire of hell ſhall enter into his belly*;" and it is alſo related, that a perſon having brought water for *Aboo Hareerá* in a ſilver veſſel, he refuſed to drink, declaring that the prophet had prohibited him from drinking out of ſuch a veſſel. The prohibition, therefore, being eſtabliſhed with reſpect to drinking, it follows that the rule extends to the uſing of oils, and ſimilar articles, that being in effect the ſame with drinking, ſince in both caſes the *uſe* of a veſſel of gold or ſilver is induced,—whence it is that the uſe of a golden or ſilver ſpoon is abominable, as alſo the uſe of a ſilver or golden bodkin for drawing antimony along the eye-lids, or of boxes for holding antimony, or any other thing, made of thoſe metals.

The uſe of veſſels of lead, glaſs, cryſtal, and agate, is permitted. *Shafeï* maintains that thoſe are abominable, becauſe they reſemble gold or ſilver in point of ſplendor.

It is
able
veſſ
lead,
cryſtal, or
agate;

It is allowable, according to *Haneefa*, to drink out of an wooden veſſel ornamented with ſilver, provided the particular part to which the lip is applied be void of it. In the ſame manner, alſo, it is permitted to ride upon a ſaddle interwoven with ſilver, provided the ſpace allotted for the ſeat be plain; and this rule likewiſe holds with reſpect to a couch or ſopha.—According to *Aboo Yooſaf*, on the contrary, all thoſe are abominable.—From *Mohammed* there are two traditions on this point; one correſponding with the opinion of *Haneefa*, and the other with that of *Aboo Yooſaf*. After the ſame manner they have diſagreed concerning the uſe of a *veſſel* or *chair* adorned both with gold and ſilver; concerning ſwords, moſques, frames of glaſſes, and books, when they are ornamented either with gold or ſilver; and alſo concerning ſtirrups, bridles, or cruppers of that deſcription.—Theſe differences of opinion, however, exiſt only where the gold and ſilver is ſo applied, in any of theſe caſes, that it is to be ſeparated only by means of ſome difficult proceſs: but the gilding of things, either with gold or ſilver, in ſuch a manner as to require art to ſeparate it, is unanimouſly allowed.—The argument of the two diſciples is that the uſe of one part of a veſſel includes the uſe of the whole; wherefore they hold it equally abominable as if the part applied to uſe were likewiſe of gold or ſilver. *Haneefa*, on the other hand, argues that *ornaments* of gold or ſilver, when not applied to uſe, are merely appendages, and therefore not to be regarded; whence the uſe of the article is allowable, in the ſame manner as wearing a garment which is trimmed with ſilk, or a ring which has a piece of gold ſet in it.

or to drink
out of veſſel
or ri
a ſaddle, or
ſit upon a
chair or ſopha,
ornamented
with gold or
ſilver.

If

information of an infidel may be

eſs of any particular food.

If a perſon ſend his ſervant, or a hireling, being a *Magian*, to purchaſe meat, and he purchaſe meat accordingly, and acquaint his it from a *Jew*, a *Chriſtian*, or a *Muſſulman*, it is lawful for him [the maſter] to eat the food ſo purchaſed; becauſe the word of an infidel is creditable in all matters of a temporal nature, as he is preſumed to be poſſeſſed of reaſon, and falſehood is prohibited in his religion: beſides, there is a neceſſity for believing his aſſertion in temporal concerns, from their frequent occurrence. If, on the contrary, the ſervant inform his maſter, that "he purchaſed the "meat from an infidel who is not a ſcripturiſt, and it was ſlain by "one who was neither a ſcripturiſt nor a *Muſſulman*," it is in that caſe unlawful for the maſter to eat the fleſh ſo purchaſed; for as the word of an infidel is credited with reſpect to the *legality* of meat, it is credited with reſpect to the *illegality*, in a ſuperior degree.

A preſent

hands of a ſlave or an infant.

If a ſlave, either male or female, or an infant, ſhould carry ſome- to a perſon, ſaying "ſuch an one has ſent this to you as a pre- "ſent," in that caſe the perſon may juſtly credit the information, as it is a frequent cuſtom to ſend preſents by ſuch meſſengers. In the ſame manner, if either of theſe ſhould intimate to a ſlave that his maſter had given him a licence to trade, he is allowed, accordingly, to accept of it; becauſe it is perhaps impoſſible for them to bring witneſſes to atteſt the intention of the maſter, whence, if their word were not credited, it would occaſion an obſtruction to buſineſs, and an unneceſſary reſtraint amongſt mankind.—It is related, in the *Jama Sagheer*, that where a ſlave girl comes to a perſon and ſays, "my "maſter has ſent me as a preſent to you," it is lawful for that perſon to accept of her.

The word of [illegible]

In all temporal concerns the word of a reprobate * may be taken;

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* Arab. *Faſik*, in oppoſition to *Adil*, a *juſt* or *upright* perſon.—The diſtinction between theſe terms has been fully explained elſewhere.

but in matters of a *ſpiritual* nature the word of an upright man only is to be credited. The reaſon of this diſtinction is, that affairs of a temporal nature are of frequent occurrency amongſt every ſect of men; whence if, in the tranſaction of them, any thing more than maturity of age and ſanity of intellect (ſuch as integrity, &c.) were required, it would occaſion a reſtriction in buſineſs; to obviate which, the word of one perſon, in ſuch caſe, is creditable, whether that perſon be virtuous or diſſolute, a *Muſſulman* or an infidel, a man or a woman. Concerns of a *ſpiritual* nature, on the contrary, are not of ſuch frequent occurrency; hence it is requiſite that in relation to them a greater caution be uſed. The word, therefore, of none but an upright *Muſſulman*, is admiſſible in ſpiritual matters; becauſe an unjuſt man lies under a ſuſpicion of falſehood; and an infidel, as not following the LAW himſelf, has no right of enforcing it upon others. The caſe is different with reſpect to *temporal* matters; for an infidel is permitted to reſide in a *Muſſulman* territory purely on account of his temporal buſineſs, for which he would be incapacitated if his word in temporal matters were to be rejected. From this neceſſity, therefore, credit is given to it.—A perſon, alſo, whoſe character is unknown, is conſidered in the ſame light as an unjuſt man or reprobate; and his word relative to matters of faith is inadmiſſible. It is, however, related in the *Zâhir Rawâyet*, that *ſuſpicion* and probable *conjecture* are the grounds on which it is lawful to determine in this point;—in other words, practice muſt accord with the conjecture which appears moſt probable or beſt ſupported. There is alſo another tradition from *Haneefa*, that the word of a perſon of unknown character may be believed in matters of a ſpiritual nature.

may be taken in all *temporal* concerns; but not in *ſpiritual* matters;

and the ſame of a perſon of *unknown* character.

THE word of a freeman or ſlave, whether male or female, is admitted in ſpiritual concerns, provided they be upright *; for, in conſequence of integrity, veracity proponderates; and this is a cauſe of belief.

The word of an perſ ther fre or ſlave, may be taken in iritual matters.

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* Arab. *Adil*; in oppoſition to *Faſik*.

belief.—It is to be obſerved, that what was before related, of licencing a ſlave to trade, ſending preſents and meſſages, and the like, are of the claſs of *temporal* matters; as is alſo the inveſting of another with the power of agency.—Information, on the contrary, concerning the impurity of water (for inſtance) is a matter of a *ſpiritual* nature. In this inſtance, therefore, if the former be an upright *Muſſulman*, the perſon who receives the information is at liberty, in performing his purification, to ſubſtitute ſand for the water, in the manner of *teyummim*[*], and muſt not perform it with the water.—If, on the contrary, the informer be a profligate, or of unknown character, it is incumbent on the perſon who receives the information to conſider the matter deliberately; when, provided he conclude the informer to be a perſon of veracity, he muſt perform *teyummim* inſtead of ablution.—(In this caſe, however, he ſhould uſe the precaution of firſt pouring out a little of the water, and may then perform *teyummim*; whereas, if the informer be of an upright character, as there is in that caſe no ſuſpicion of falſehood, the pouring out the water by way of precaution, is entirely unneceſſary.)—If, on the contrary, the reſult of his reflection be that the information was falſe, he muſt perform ablution, but not *teyummim* with the water. This is what the law enjoins; but in this caſe alſo it is a requiſite precaution that, after ablution, he perform *teyummim*, as the judgment he has formed in this caſe is entirely from conjecture. It is alſo to be obſerved that legality and illegality are conſidered as of a ſpiritual nature where they affect not the *property* of any perſon. Where, on the contrary, the teſtimony of one upright perſon tends to injure the property of another, it is not in ſuch caſe of any weight;—as where, for inſtance, an upright perſon teſtifies that a certain perſon has married his own foſter-ſiſter; in which caſe his teſtimony is not creditable, as tending to hurt the property of the huſband, inaſmuch as he would be deprived of the effects of the woman, to which the marriage had entitled him;—or where a perſon informs another, who had purchaſed a ſlave-girl, that ſhe is his own foſter-ſiſter, or that ſhe is a free woman.

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[*] For a further explanation of this, ſee Vol. I. p. 295.

It is laudable to accept an invitation to a marriage-feaſt,—notwithſtanding any irregularities which may be practiced there;

If a perſon be invited to a marriage-feaſt, and, upon going there, obſerve the company to be engaged in wanton amuſement, or in ſinging, ſtill it is laudable in him to ſit down and partake of the entertainment; for the acceptance of ſuch invitation is ſtrictly orthodox, as the prophet has ſaid, "*whoſoever refuſes an invitation, is certainly not* "*obedient to me.*"—He is not, therefore, to leave the entertainment on account of any irregularities committed by others; in the ſame manner as, at the ceremony of a funeral prayer, a perſon is not to abſent himſelf, although people hired for the purpoſe of lamentation may there be preſent.—If, however, he have power to prohibit theſe irregularities, it is incumbent on him to exert it: but if he poſſeſs not ſuch power, he muſt then remain with patience.—This is where the perſon invited is not a *Mooktiddi**, or holy man; for, if ſuch a perſon ſhould be preſent and have it not in his power to reſtrain theſe irregularities, it is then incumbent on him to withdraw, as his preſence in ſuch a place ſhews a relaxation of religion. If, alſo, irregularities be committed during the time of eating, it is improper that any perſon ſhould remain there, whether he be a *Mooktiddi* or not; God having prohibited us, in the Koran, from ſitting in company with the wicked. All this proceeds on the ſuppoſition of the invited perſon being actually preſent at the marriage-feaſt, before he is aware of thoſe irregularities; for if he be previouſly aware of ſuch irregularities being practiced, it it is incumbent on him to ſtay away, whether he be a *Mooktiddi* or otherwiſe.

unleſs thoſe irregularities be known before hand.

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* Literally, an *exemplary* perſon, as being eminent for ſanctity of character,—whence the term is applied to prieſts, or other perſons who exerciſe a holy office.—The *Perſians* term ſuch a perſon a *Peiſhwa*, or *one who leads the way*.

## SECT. II.

### *Of* DRESS.

*Women* may dreſs in ſilk; but *men* muſt not,

A DRESS of ſilk is not lawful for men; but women are permitted to wear it; for it is related by ſeveral of the companions of the prophet, of whom was *Alee* in particular, that one day the prophet appeared with a piece of ſilk in one hand, and of gold in the other, and ſaid, "*Both theſe are prohibited to the* MEN *of my tribe, but are lawful* "*to the* WOMEN."

farther than what is merely *ornamental*.

A SMALL quantity of ſilk, ſuch as three or four fingers breadth, uſed as a fringe or border to a garment, or applied to any ſuch purpoſe, is allowable; becauſe it is related that the prophet prohibited the wearing of ſilk, excepting a ſhred of the breadth of three or four fingers in a garment; and it is moreover related, that the prophet wore a robe with an edging of ſilk to it.

A *pillow* of ſilk is allowable;

ACCORDING to *Haneefa*, it is allowable to make a pillow of ſilk, and to ſleep upon it. The two diſciples, on the contrary, hold this to be abominable; and the ſame difference of opinion obtains concerning making curtains of ſilk, and hanging them upon doors. The arguments of the two diſciples on this point are twofold. FIRST, the uſe of ſilk in general is proſcribed by the prophet. SECONDLY, the making pillows and curtains of ſilk is a cuſtom of the proud; and the imitation of ſuch is forbidden.—The argument of *Haneefa*, on the other hand, is that the prophet ſat upon a pillow of ſilk; and that there was one laid upon the ſopha of *Abdoola Ibn Abbàs*.

IT

ſilk to warriors,

It is allowed to warriors, in the opinion of the two diſciples, to wear a dreſs of ſilk or ſattin in the time of war; becauſe there is a tradition, recorded by *Shaaby*, that the prophet permitted the wear of ſilk during the time of battle. Moreover, it is in a manner neceſſary, as being beſt adapted to counteract the hard preſſure of armour, and tending to excite horror in the eyes of the enemy. *Haneefa*, on the contrary, holds this to be abominable, becauſe the traditions which point out its illegality are abſolute, without diſtinguiſhing between any particular period or juncture, ſuch as war, or the like; and the neceſſity may be anſwered in a dreſs of *Makhloot*,—that is, having the woof of ſilk, and the warp of any thing elſe. Beſides, ſilk, and every other thing that is proſcribed, becomes allowable in no caſe but that of neceſſity;—and with reſpect to the tradition recorded by *Shaaby*, it alludes to a dreſs of *Makhloot*.

or of mixed cloth.

A garment of cloth, the woof of which conſiſts of ſilk, and the warp of any thing elſe, ſuch as wool or cotton, is allowable to wear during war, becauſe of its being neceſſary: but it is abominated at any other juncture, becauſe then there is no neceſſity for it. The ſame rule alſo obtains with reſpect to cloth of which the warp is ſilk and the woof wool or cotton; and for the ſame reaſon.

## SECT. III.

## *Of* ORNAMENTS.

Men are not to wear ornaments of gold or

**Men** are prohibited from the uſe of ornaments of gold, ſuch as rings, and the like, becauſe of a ſaying of the prophet to that effect. Ornaments of ſilver are likewiſe unlawful; becauſe ſilver is, in effect, the ſame as gold. An exception, however, is made with reſpect to except on ſwords.

ſignet-rings, girdles, or ſwords; the uſe of ſilver in ornamenting thoſe being approved.—In the *Jama Sagheer*, it is related that *ſilver* rings only ſhould be uſed; whence it may be inferred that rings of ſtone, iron, or braſs, are forbidden. It is alſo related, that the prophet, on ſeeing a ring of braſs upon the finger of a man, ſaid, "*I perceive the ſmell of an image*;" and again, that having ſeen, upon the finger of another perſon, a ring of iron, he ſpoke to him thus, "*I ſee upon your finger the ornament of the people of hell.*"—What is here ſaid reſpects the circular hoop, and not the *ſetting* or *beazel* of the ring. Hence it is lawful that the ſetting be of ſtone. It is proper, however, that men, in wearing rings, turn the ſetting or beazel towards the palm of the hand, and women otherwiſe, becauſe, with reſpect to them, rings are conſidered as ornaments.—Sovereigns and judges, moreover, wear rings, only as having occaſion to ſeal with them; but with reſpect to other people, it is moſt adviſeable that they never wear rings, as a like reaſon does not operate with them.

The ſetting of a ring may be of gold.

If a piece of gold be inſerted in the ſetting of a ring, it is allowable; for, in that caſe, the gold is only a dependant on the ring, in the ſame manner as a ſhred of ſilk upon a garment.

Gold is not to be uſed in any caſes of neceſſity, where ſilver will anſwer equally well.

It is forbidden, in the opinion of *Haneefa*, to bind the teeth * with a thread of gold. *Mohammed*, on the other hand, maintains that this practice is unobjectionable. Of *Aboo Yooſaf* there are two opinions recorded; one correſponding with the opinion of *Haneefa*, and the other with that of *Mohammed*. The two diſciples, in ſupport of their opinion, quote the caſe of *Arifjá* the ſon of *Aſſád*, who, having loſt his noſe by a wound he received at the battle of *Goolab*, made a falſe one of ſilver, which occaſioning a very offenſive ſmell, the prophet commanded him to make another of gold. The argument of *Haneefa* is, that gold is in its nature unlawful, whence the uſe of it is allowable only in a caſe of neceſſity; and as the neceſſity may in general be equally well anſwered by ſubſtituting ſilver, gold therefore remains ſubject to its original ſtate [of prohibition:] this neceſſity, however, could not be anſwered, in the caſe of *Ariſſa*, but by a ſubſtitution of gold, becauſe of the ſilver occaſioning a nauſeous ſmell.

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* This poſſibly means where a *ſuppoſititious* tooth is placed in the head to ſupply the loſs of one.

Infants muſt not be ſumptuouſly apparelled.

IT is abominable in any perſon to clothe his infant child in a dreſs of ſilk, with ornaments of gold; for, ſince that dreſs is proved to be prohibited to men, they are conſequently forbidden to dreſs others in it; in the ſame manner as it is unlawful to *give* wine to drink, becauſe of the illegality of drinking it.

Vain ſluities are not allowable.

THE cuſtom of keeping handkerchiefs, as is frequently practiced, is abominable. Many, however, hold that it is allowable, if done from motives of neceſſity. This is approved; for the practice is abominable only when done oſtentatiouſly, in the ſame manner as the mode of ſitting with the knees on a line with the chin, and the hands folded round the legs *.

IT is allowable to bind the finger with a ſtring, or a ring, with a view to aid the memory concerning ſome buſineſs relative to another perſon.

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* Meaning, that when a perſon ſits in the manner ſo deſcribed, from oſtentation, it is abominable, but that it is allowable when done with a view to obtain reſt.

## SECT. IV.

### *Of the* COMMERCE *of the* SEXES; *and of looking at or touching any Perſon.*

Men muſt not look at ſtrange women, except in the face, hand,

It is not permitted men to look at ſtrange women, except in the face, and palm of the hands, which is allowable, becauſe women being frequently concerned in buſineſs with men, ſuch as giving, taking, &c. it would therefore ſubject them to great inconvenience if theſe parts were veiled, whence there is a neceſſity for leaving them bare.—It is reported, from *Haneefa*, that it is allowable to look at the feet of a woman, becauſe of there being ſometimes occaſion for it. From *Aboo Yooſaf* there is a tradition that the ſeeing of the ſhoulder is likewiſe allowed; becauſe that, from the influence of cuſtom, it is left expoſed. If, however, a man be not ſecure from the impulſe of luſt, it is not allowable to look even at the *face* of a woman, except in caſes of abſolute neceſſity.

or foot.

A man (if young) muſt not *touch* a ſtrange woman.

It is not lawful for a man to touch the hand of a ſtrange woman, notwithſtanding he have a controul over his luſt; becauſe the prophet has ſaid, "*whoſoever toucheth a ſtrange woman, ſhall be ſcorched in the hand with hot cinders on the day of judgment.*"—This, however, proceeds on a ſuppoſition of the woman being young; for if ſhe be old, inſomuch as to be inſenſible to luſt, in that caſe it is lawful to touch her at the time of ſalutation. The caſe is ſimilar where the man, being old, is inſenſible to paſſion himſelf, and not ſuch as to excite it in the woman he touches.

IT is lawful to touch or look at a young girl inſenſible of the car-appetite; as in that caſe there is no apprehenſion of ſeduction.

A female infant may be
looked at.

A KÂZEE may look in the face of a ſtrange woman, when he paſſes a decree upon her, notwithſtanding there be an apprehenſion of luſt; becauſe he is under a neceſſity of ſo doing, for the purpoſe of expediting his decrees, in order that the rights of mankind may ſuſtain no injury.—Witneſſes, alſo, are under the ſame neceſſity, in order to their giving evidence; and hence it is lawful for them likewiſe to look in the face of a ſtrange woman, where they are deſirous of giving evidence concerning her.—With reſpect, however, to looking merely *in order* to bear teſtimony, it is certain that this is not allowable where there is any apprehenſion of luſt, ſince others might be found free from ſuch influence; which argument does not apply at the time of *actually giving* evidence.

Rules to be obſerved by a
when a
in his judicial capacity;—or by a *witneſs.*

A MAN may without blame look on a woman whom he has an inclination to marry, notwithſtanding he knows that it will inflame his paſſion.

A woman may be looked at with a view to mar-

A PHYSICIAN, in adminiſtering to a ſtrange woman, is permitted to look at the part affected. It is, however, moſt adviſeable that he inſtruct another woman how to apply the remedy, as the circumſtance of an individual of one ſex looking at another of the ſame is of leſs conſequence. If he ſhould not be able to procure a fit woman to inſtruct, it is in that caſe incumbent on him to cover all the members of the woman, leaving expoſed only the particular part affected, when he may look towards it; refraining from it however as much as is poſſible, ſince any thing the ſufferance of which is prompted by neceſſity, ought to be exerciſed with as much reſtriction as the circumſtances of the caſe will admit.—In the ſame manner alſo, it is lawful for a man, in adminiſtering a glyſter to a man, to look at the proper part.

Rules to be obſerved by a phyſician in preſcribing for women.

A man may view or touch any part of another man, except his nakedneſs.

One man may, without blame, look at any part of another, except from beneath the navel up to the knee; becauſe the prophet has ſaid, "*the nakedneſs of a man is from the navel to the knee*;" and as, in another tradition, it is ſaid, "*from beneath the navel*," it may thence be inferred that the navel is not included, but that the knee is ſo.—Still, however, in this a gradation is obſerved; for the expoſure of the knee is of leſs conſequence than that of the thigh, as on the other hand the expoſure of the thigh is not ſo bad as that of the *poſitive* nakedneſs, or genitals; wherefore a perſon is to be reproved mildly when he leaves his knee bare; to be treated more harſhly when he covers not his thigh; and, in the caſe of expoſing his genitals, muſt be compelled by puniſhment to cover them.

Every part of a man, which it is proper for another to look at, may likewiſe, without blame, be touched by him; for the ſight and the touch of thoſe parts of a man which are not *nakedneſs* are conſidered in the ſame light.

A *woman* alſo, may look at any part of a man except his nakedneſs, (provided ſhe be free from luſt,)

Women may lawfully look at a man, except in the ſpace from the navel to the knee; provided, however, they be ſecure from luſt; for men and women are conſidered as alike, in looking at parts not private, the ſame as in looking at a dreſs or a quadruped. (In the *Mabſoot*, under the head of *Hermaphrodites*, it is related that a woman looking at a ſtrange man reſembles a man looking at his female relation, in which caſe it is unlawful that he look at her back or belly *, leſt he thereby excite luſt.)—If, however, a woman be enflamed with luſt, or harbour a ſtrong ſuſpicion that looking at a man would create it, or be in any degree doubtful about it, in either of theſe caſes it is moſt becoming that ſhe ſhut her eyes, and avoid looking at a ſtrange man; and if a man alſo be thus circumſtanced, it is incumbent on him to cloſe his eyes, nor muſt he look at a ſtrange woman; becauſe luſt having great power over women, is conſidered as always operating upon them; and when men are alſo ſubject to a paſſion of that nature, it exiſts then on the part of both; and this is a weighty reaſon for rendering their looking at each other illegal. It is otherwiſe where the woman is influenced and not the man, for then there is not an equally cogent reaſon to render it unlawful, one party only being in that caſe enflamed with luſt.

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* The reaſon of this is explained hereafter.

**or at any ſuch part of another woman.**

A WOMAN is permitted to look at any part of another except from under the navel to the knee. This is according to one tradition of *Haneefa*; but according to another tradition, the looking of one woman at another of her ſex, is the ſame as that of a man at his female relation; that is, they are not permitted to look at the back or belly. The firſt tradition is however the moſt authentic.

**A man may view his wife or his ſlave in any part.**

IT is lawful for a man to look at his ſlave girl in any part, provided ſhe be not related to him within the prohibited degrees; and alſo at his wife in any part, even in the *pudenda*, if he pleaſe; becauſe the prophet has ſaid, "*ſhut your eyes from all excepting your wives and* "*female ſlaves.*" Nevertheleſs, it is moſt becoming that a huſband and wife ſhould neither of them look at the genital parts of the other, as the prophet has ſaid, "*when ye copulate with women of your own* "*tribe, you muſt conceal as much as poſſible; and be not then naked, as* "*that ſavours too much of the cuſtom of aſſes.*"

**A man may look at the perſon of his**

IT is lawful for a man to look at his female relation either in the face, head, breaſt, ſhoulder, or legs; for as it is uſual with relations to viſit one another without any previous intimation, and unattended with any retinue, and as women, in their houſe, generally wear a dreſs adapted to ſervice, if, therefore, the ſight of theſe parts were culpable, it would impoſe too great reſtraint upon them. It is different with reſpect to other parts; and hence proceeds the illegality of looking at the *back* or *belly*. (It is proper to obſerve that by the term relation, [*Mohrim,*] as here uſed, is to be underſtood any perſon between whom and the beholder marriage is utterly and perpetually illegal, in conſequence of affinity by either blood or marriage.)

Male and female relations may touch each other (if there be no apprehenſion of paſſion,)

EVERY part in a relation which it is lawful to look at may likewiſe be touched; unleſs, however, there be a dread of its enflaming the paſſion of either, in which caſe neither the ſight nor the touch is approved.

or ſit in private, or travel together.

THERE is no impropriety in a man ſitting in private with his female relation, or travelling with her; becauſe the prophet has ſaid, "*No woman ſhall travel more than three days and three nights, unleſs* "*accompanied by her huſband, or her relation; and if, in this caſe, the* "*woman ſhould have occaſion to mount upon, or deſcend from, a horſe;* "*the man may then, in aſſiſting her, without blame, touch her back or* "*belly, if covered, and provided he be ſure of his paſſion; but otherwiſe* "*he muſt beware of touching her.*"

A man may look at the female ſlave

as at his kinſwoman;

EVERY part which it is lawful for a man to look at in his female relation, may likewiſe be viewed by him in the female ſlave of another, whether ſhe be an abſolute ſlave, a *Modàbbirá*, a *Mokâtibá*, or an *Am-Walid*; for as a ſlave is neceſſitated to wear clothes adapted to ſervile employments, that ſhe may diſcharge the buſineſs of her maſter, and attend upon his gueſts, her condition without the houſe is therefore the ſame, in relation to a ſtranger, as that of a free woman without the houſe, in regard to her kinſman.—With reſpect to privacy, or travelling with the female ſlave of another, many have ſaid that it is allowed, in the ſame manner as in the caſe of a female relation.—Some, however, declare it improper, as not being juſtified by neceſſity. *Mohammed,* in the *Mabſoot,* has ſaid, that the aſſiſting of a female to aſcend or deſcend from a horſe is approved, provided it be in a caſe of neceſſity.

and may alſo touch her with a view to purchaſe.

It is permitted to a man to touch a female ſlave when he has an inclination to buy her, notwithſtanding he may be apprehenſive of luſt. It is ſo related in the abridgment of *Kadooree*; and *Mohammed*, in the *Jama Sagheer*, has given a ſimilar abſolute opinion in this caſe, without making any exceptions as to the circumſtance of luſt. The two diſciples, on the other hand, maintain that although, on account of neceſſity, it be proper for a perſon to *look* at a ſlave girl when he is about to purchaſe her, notwithſtanding it may be the means of inflaming his paſſion, ſtill it is improper to *touch* her when under the impulſe of paſſion, or where there is a probability of its being excited. In caſe of an exemption from paſſion, however, they hold it allowable either to touch or look at her.

An adult female ſlave muſt be put in a decent habit.

When a female ſlave arrives at maturity, it is improper to leave her in *drawers* only: on the contrary, it is requiſite that ſhe have two clothes, in order that her back and belly may be covered, as theſe, with regard to her, may be conſidered as privy parts. It is moreover reported, from *Mohammed*, that when a female ſlave reaches the age of puberty, ſhe muſt not be expoſed in *drawers* only, as that may occaſion luſt.

An eunuch or hermaphrodite are the ſame as a man with reſpect to thoſe rules.

A Khasee, or *ſimple* eunuch, is conſidered in the ſame light with a man, whence any thing prohibited to a man is ſo likewiſe to him, for he poſſeſſes virility, and is not diſabled from copulation; and the ſame, alſo, of a *Majboob*, or *complete* eunuch; for he is likewiſe capable of friction, and has the power of paſſing ſemen; and ſo likewiſe of an hermaphrodite, as he is merely a defective man.

his mi but in face, or hands.

It is not lawful for a male ſlave to view his miſtreſs, except in the face, or palm of the hands, in the ſame manner as a ſtranger's. *Málik* maintains that a ſlave is in the predicament of a kinſman within the prohibited degrees; (and ſuch alſo is the opinion of *Shafeï*;) becauſe his miſtreſs is ſubject to his entering her apartment frequently without

out intimation. The arguments of our doctors are, that the ſlave is a man neither related to her as a kinſman nor huſband; that he is liable to be influenced by a paſſion towards her, as marriage may eventually be lawful between them; (that is, in caſe of his emancipation;) and that there is no neceſſity for his approaching her without leave, as the buſineſs of a ſlave properly lies without the houſe.

A man may gratify his paſſion with his female ſlave in whatever way he pleaſes.

It is lawful for a man to perform the act of *Azil** with his female ſlave without her conſent, whereas he cannot lawfully do ſo by his wife, unleſs with her permiſſion.—The reaſon of this is that the prophet has forbidden the act of *Azil* with a free woman without her conſent, but has permitted it to a maſter, in the caſe of his female ſlave. Beſides, carnal connexion is the right of a free woman, for the gratifying of her paſſion, and the propagation of children, (whence it is that a wife is at liberty to reject a huſband who is an eunuch or impotent,) whereas a ſlave poſſeſſes no ſuch right.—A man, therefore, is not at liberty to injure the right of his wife, whereas a maſter is abſolute with reſpect to his ſlave.—If, alſo, a man ſhould marry the female ſlave of another, he muſt not perform the act of *Azil* with her without the conſent of her maſter.

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* For a definition of *Azil*, ſee Vol. I. p. 167.

## SECT. V.

### *Of* ISTIBRA, *or waiting for the* PURIFICATION *of* WOMEN *.

A MAN, when he purchaſes a female ſlave, is not permitted either to enjoy her, or to touch, or kiſs her, or look at her *pudenda*, in luſt, until after her *Iſtibra*, or purification from her next enſuing courſes; for when the captives taken in the battle of *Autáſs* were brought thence, the prophet ordained that no man ſhould have carnal connexion with pregnant women until after their delivery, or with others until after one menſtruation; which evinces that the abſtinence ſo enjoined is incumbent on a proprietor; and further, that the *occurrence* of right of property and of poſſeſſion is the occaſion of its being incumbent. The end propoſed in this regulation is, that it may be aſcertained whether conception has not already taken place in the womb, in order that the iſſue may not be doubtful.

**A man muſt not have connexion with his purchaſed female ſlave until one term of her courſes have elapſed:**

ABSTINENCE until after purification is incumbent on the *buyer*, but not on the *ſeller*; for the true reaſon of its neceſſity is the deſire of copulation; and as the buyer is preſumed to poſſeſs this deſire, and not the ſeller, the obſervance of it is therefore enjoined him, and not the other. If, moreover, deſire be an internal operation of the mind, the obligation of the law, in this particular, reſts upon the *argument*

**but this rule operates only on the *purchaſer*, not on the *ſeller*.**

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* A phrazeology runs throughout this ſection which renders the tranſlation of it into *Engliſh* particularly difficult, as the preciſe meaning of the term *Iſtibra* cannot be expreſſed by any ſingle word in our language.—The beſt *Arabic* lexicons define *Iſtibra* to ſignify "*the purification of the womb.*"—The term, however, muſt here be received in a more involved ſenſe; for *Iſtibra* does not, in fact, mean ſimply *purification*, but *a deſire* of, or (as rendered in the text) a *waiting for* purification; for which reaſon the tranſlator renders it *purification*, or *abſtinence*, as beſt ſuits the context.

of ſuch deſire. Now the mere *power* of committing the carnal act is an argument of the deſire for ſuch act; and as this power is eſtabliſhed only by property and poſſeſſion, it follows that property and poſſeſſion are the occaſions of this obligation of abſtinence.—This law, therefore, extends to a right of property, in all its different modes of being acquired, ſuch as by purchaſe, donation, legacy, inheritance, covenants, &c. whence it is that this abſtinence is enjoined upon a perſon, who buys a female ſlave, either from an infant, or a woman, or from a ſlave licenced to trade*, or from a perſon who is by law prohibited from having any carnal connexion with her. In the ſame manner, alſo, this abſtinence is incumbent where a perſon buys a female ſlave who is a virgin; for the law proceeds according to the proof of the cauſe which prompted it, and not according to the proof of the propriety or expediency, as theſe relate to what is internal and unknown.

In the purchaſe of a *menſtruous* female ſlave, the purchaſer muſt wait for another complete term.

IF a perſon purchaſe a female ſlave during her menſtruation, no regard is paid to this menſtruation with reſpect to determining the abſtinence†. In the ſame manner, alſo, no regard is paid to a menſtruation which occurs between the time of taking poſſeſſion and the time of the right of property being eſtabliſhed, by purchaſe, or the like;—and ſo likewiſe, regard is not paid to the delivery of a female ſlave between the eſtabliſhment of a right of property in her, and the act of taking poſſeſſion,—(contrary, however, to the opinion of *Aboo Yooſaf*.)—The reaſon of this is, that the occurrence of right of property and poſſeſſion is the *cauſe* of purification being required; and the obligation of obſerving the purification is an *effect* of property and poſſeſſion; and the *effect* cannot take place before the occurrence of the *cauſe*. The ſame rule holds with regard to ſuch menſtruous purgations as may happen previous to the procuring of ſanction, in the caſe of an unauthorized ſale of a female ſlave, notwithſtanding the purchaſer may be ſeized of her;—and ſo likewiſe, where the courſes happen after the ſeizin in the caſe of an illegal contract of ſale, and before the ſlave is purchaſed by a valid contract; for in none of all theſe caſes do the preſent courſes determine the abſtinence.

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* The ſlave licenced to trade is, in this caſe, ſuppoſed to have been prohibited from cohabiting with the ſlave, as the goods he ſells or purchaſes are preſumed to be the property of another, namely, his maſter.

† Arab. *Fee bàbal Iſtibrá*; (literally) "*in point of purification*,"—meaning that purification requiſite to determine the abſtinence impoſed on the purchaſer of a female ſlave.

A perſon purchaſing his partner's ſhare in a female ſlave muſt wait until her next purification.

Abstinence is requiſite in the caſe of a *partnerſhip* female ſlave, where one of two partners purchaſes the other's ſhare; for here the *cauſe* is complete, and upon the completion of the *cauſe* the effect takes place.

Other rules to be obſerved reſpecting female ſlaves.

If a perſon purchaſe a *Magian* female ſlave, or receive her in donation, and ſhe, after his taking poſſeſſion of her, have her courſes, and then become a *Muſlimá*,—or, if a perſon purchaſe a female ſlave, and make her a *Mokátibá*, and ſhe, after his taking poſſeſſion of her, having voided her courſes, prove unable to diſcharge her ranſom,—ſuch courſes are ſufficient to eſtabliſh the requiſite purification, in either of theſe caſes, as having happened after the occurrence of the *cauſe* for waiting, namely, right of property and poſſeſſion.

In caſes where a female ſlave, having eloped, returns to her maſter,—or, having been taken away, or hired out, is reſtored,—or, having been pawned, is redeemed,—abſtinence is not requiſite, for the cauſe of it (namely, the acquiſition of property and poſſeſſion) does not exiſt in either inſtance.

Where the carnal act is unlawful, all *incent* it are hibited.

In every caſe where abſtinence is enjoined, and carnal connexion prohibited, all ſorts of allurements and dalliance, ſuch as kiſſing and hugging, are likewiſe prohibited, as theſe lead to the commiſſion of unlawful acts. Add to this, the poſſibility of their being committed on the property of another, as may happen if the ſlave prove with child and the ſeller lay claim to her. (It is reported from *Mohammed* that dalliance with a *captive* ſlave-girl is lawful.)

**Pregnant women are purified by delivery, and immature females by the lapſe of one month.**

The purification of a pregnant female ſlave is eſtabliſhed by her delivery, and that of a girl in whom the menſes have not yet appeared, by the lapſe of a month, that ſpace being, with reſpect to ſuch an one, a ſubſtitute for the courſes, in the ſame manner as holds in the caſe of a woman under *Edit*[*]. If, however, the menſtrual blood ſhould diſcharge itſelf *before* the expiration of the month, the purification by lapſe of time is annulled, becauſe of the ability with reſpect to the *original* circumſtance, prior to accompliſhing the object of the *ſubſtitute*.

**Rule reſpecting adult females not ſubject to the courſes.**

If the courſes be delayed in a female ſlave who is of age to be ſubject to them, it is in that caſe requiſite to refrain from any carnal connexion with her, until it appear that ſhe is not pregnant, when it becomes lawful to cohabit with her. (This opinion is quoted from *Haneefa*, in the *Zâhir Rawâyet*, without ſpecifying any particular *term.)*

**Devices uſed to elude the abſtinence required;**

It is allowable, according to *Aboo Yooſaf*, to elude the abſtinence by the practice of a device; in oppoſition to the opinion of *Mohammed.* The arguments of each on this point have been already detailed under the head of *Shaffa.*—The opinion of *Aboo Yooſaf* has been adopted by *Kâzees* in their deciſions, where it has appeared that the ſeller had not cohabited with the ſlave from the period of her courſes antecedent to the ſale;—and, according to the opinion of *Mohammed*, when the contrary has been proved. The device which may be practiced in a caſe where the purchaſer is not married to a free woman [*], is that he may firſt *marry* the ſlave, and then purchaſe her [†].—If, on the contrary, he be already married to a free woman, the device in that caſe is that the ſeller, previous to the ſale, or the purchaſer, before taking poſſeſſion, give the ſlave in marriage to another perſon, (who muſt, however, be one in whom they can confide, that he will not cohabit with her, and that he will divorce her,) and then, that the party *purchaſe* the ſlave, in the former inſtance, or take poſſeſſion of her, in the latter,—and the huſband divorce her;—becauſe as the purchaſer was at any rate prohibited from cohabiting with the ſlave at the time when the cauſe of abſtinence firſt operated, (that is, when he firſt acquired property and poſſeſſion,) no abſtinence is therefore required after ſhe *did* become lawful to him, as regard is paid to the time and circumſtances under which the cauſe takes place;—in the ſame manner as where a perſon purchaſes and takes poſſeſſion of a ſlave who is in her *Edit*,—in which caſe, upon the expiration of the term of *Edit*, abſtinence is no longer required, ſince in this caſe the ſlave was not lawful to the purchaſer at the time of the *cauſe* taking place.

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[*] See *Edit*, Vol. I. p. 360.—There ſeems here to be a ſmall miſtake in the text, as the *Edit* of a female ſlave not ſubject to the courſes is determined by the lapſe of a *month and an half*.

A perſon pronouncing *Zihár* muſt entirely abſtain from his wife until he have made expiation.

It is not lawful for a perſon who has given abuſive language to his wife [‡], either to look at her *pudenda* in luſt, or to cohabit with her, or to kiſs or touch her, until ſuch time as he have performed expiation; becauſe, as it is unlawful for him to copulate with her until after expiation, it is, conſequently, unlawful that he enter into dalliances with her, ſince the *cauſe* of an illegal act is likewiſe illegal;—in the ſame manner as holds in caſes of *Yttikâf* * and *Ihrâm* †; or where a perſon, by miſtake, cohabits with the wife of another,—in which caſe ſhe muſt obſerve an *Edit*; during which, as it is unlawful for the the huſband to have connexion with his wife, ſo it is likewiſe unlawful for him to uſe any of its incentives with her. It is otherwiſe during the courſes or faſting, for, although copulation be at ſuch time prohibited, yet dalliance is lawful, becauſe the courſes are frequent and of long continuance, engroſſing a great part of life, as they happen once every month, and continue ten days every time;—and, in the ſame manner, the days of faſting are protracted to one month by the divine ordinances, and (among pious perſons) voluntarily occupy a conſiderable part of life;—whence if dalliances were forbidden during thoſe terms, it would tend to reſtrain men too much in their enjoyments.

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[*] This condition is here made, becauſe it is not lawful for a *Muſſulman* to marry a ſlave if he ſhould be previouſly married to a free woman. (See Vol. I. p. 86.)

[†] It is here underſtood that marriage exempts from abſtinence.

[‡] Literally, "it is not lawful for a *Mozàhir*,"—meaning a perſon who has pronounced a ſentence of *Zihár* upon his wife. (This whole paſſage will be better underſtood by a reference to *Zihár*, Vol. I. p. 326.)

A perſon indulging in wantonneſs with two female ſlaves who are ſiſters, muſt put one of them away before he can have connexion with the other.

If a perſon, incited by paſſion, ſhould kiſs two female ſlaves who are ſiſters, he is not in that caſe permitted to have carnal connexion with either of them, or to kiſs, touch, or look at the *pudenda* of either in luſt, until he render one of them unlawful to him, either by making her the property of another, in whatever manner he may chooſe, or by giving her to another in marriage, or by emancipating her; becauſe it is not lawful either to copulate or to enter into dalliances (ſuch as kiſſing and hugging) with two ſiſters. But whenever one of them is rendered unlawful, the enjoyment of the other is permitted to him.—(The transfer of a part of the ſlave, in this inſtance, is the ſame as a transfer of the whole, with reſpect to the illegality of enjoyment *; and ſo likewiſe the emancipating her, or rendering her a *Mokâtibâ* in part.) If, on the contrary, he let one of them to hire, or pawn her, or create her a *Modabbirâ*, the other is not thereby made lawful to him, as he does not by any of theſe acts relinquiſh his property in her. If, alſo, he ſhould give one of them in marriage to any perſon by an invalid contract, he does not thereby acquire a right to enjoy the other; unleſs, however, the huſband of that one conſummate the marriage, in which caſe an *Edit* is incumbent upon her, and this is the ſame as a valid marriage, with regard to rendering the enjoyment of her illegal. If, alſo, he once carnally enjoy one of them, he may afterwards continue to do ſo;—but he cannot then lawfully have connexion with the other; for if ſo, it would be a connexion with two ſiſters, which is unlawful; but this conſequence is not induced by connexion with one of them.

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* *Yttikâf* is a religious auſterity practiſed by the moſt pious of the *Muſſulmans* in the laſt ten days of the month of *Ramzan*; they remain during that period in a moſque, without ever departing from it but when the calls of nature abſolutely force them, abſtracting themſelves at the ſame time from all enjoyments.

† *Ihrâm* is the period during which the pilgrims remain at *Mecca*.—They are then ſubject to a number of ſtrict regulations, and are particularly enjoined to refrain from all worldly pleaſures.

ANY two women who are related to each other in a degree that prevents their being lawfully married to the ſame perſon, are conſidered as ſiſters, and are conſequently ſubject to the rules exhibited in the preceding caſe.

Men muſt not *kiſs* or *embrace* each other:

IT is abominable for one man to kiſs another either in the face or hand, or on any other part; as it is likewiſe for two men to *embrace* each other. *Tabâvee* reports that this is the opinion of *Haneefa* and *Mohammed*; but that *Aboo Yooſaf* holds it not improper for a man either to kiſs or embrace another; becauſe it is related that when *Jaffier* came from *Abyſſinia* the prophet embraced him and kiſſed him between the eyes. The argument advanced by *Haneefa* and *Mohammed* is a tradition that the prophet prohibited both kiſſing and embracing; and with reſpect to the circumſtance adduced by *Aboo Yooſaf*, it muſt be conſtrued as having happened prior to the prohibition. The learned, however, have ſaid that this diſagreement between our doctors concerning the act of embracing, reſpects only a caſe where men are not properly dreſſed, as where, for inſtance, they are in *drawers* only; but that thoſe acts are allowable, in the opinion of all our doctors, when the parties are clothed with an under and upper garment.—This is the moſt approved doctrine.

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* That is to ſay, he will as completely render one of the ſiſters illegal (or forbidden) to him (and conſequently legalize his connexion with the other) by ſelling or otherwiſe transferring his property in a *part* of her, as by ſo transferring her *in toto*.

but they may join hands.

THE joining hands by way of ſalutation is allowable; for the prophet has ſaid, "*Whoſoever joins his hand to that of his brother* MUSSULMAN, *and ſhakes it, ſhall be forgiven of his ſins.*"

## SECT. VI.

### *Of the Rules to be obſerved in* SALE.

g may be ſold; but not human excrement,

THERE is no impropriety in the ſale of dung; but is is abominable to ſell human excrement. *Shafeï* maintains that the ſale of dung is likewiſe abominable, becauſe of its being actually filthy; in the ſame manner as excrement, or the undreſſed ſkin of a dead animal.—The argument of the *Haneefites* upon this point is, that dung is capable of yielding profit, as it is commonly ſtrewed upon land, in order to render it more fertile; and as it thus yields a profit, it is therefore a valuable *property*, the ſale of which is lawful. It is otherwiſe with reſpect to excrement, as that is incapable of profit, unleſs it be mixed with

unleſs mixed with mud.

with mud, when the ſale of it becomes lawful *, according to what is reported from *Mohammed*; which is approved.

nexion with a female ſlave on the faith of the ſeller's aſſertion re-

If a perſon ſee another ſelling a female ſlave, he at the ſame time knowing her to be the property of ſome other perſon, and he be informed by the ſeller that “ he has been empowered by that other to “ diſpoſe of her,” it is in that caſe lawful for him to purchaſe her, and have carnal connexion with her; becauſe the word of one man, although he be not *upright* †, may be received in temporal matters, provided there be no opponent to ſhake the credit of his teſtimony.—The ſame rule alſo holds if the ſeller allege that he had received her in donation from the other, or that he had bought her from him; with this difference, however, that he is here required to be of an upright and truſtworthy character;—and ſo likewiſe if he be *not* truſtworthy, provided the purchaſer believe that he ſpeaks truth; but if he diſbelieve him, it is not lawful for him to purchaſe the ſlave. The law is the ſame, if the purchaſer, not having previouſly known the female ſlave, be informed by the ſeller, that “ ſhe is the property of another, “ who has empowered him to ſell her,”—or that “ he has purchaſed “ her from ſuch a perſon.”—If, on the other hand, knowing her to have been in the poſſeſſion of another, he do not receive any information from the ſeller, he cannot in that caſe lawfully purchaſe her until he know by what means the ſeller has acquired a property in her; for her having been in the poſſeſſion of another is an argument of her being the property of another. If, on the contrary, he ſhould not know her to have been before the property of another, he may then lawfully purchaſe her, notwithſtanding the ſeller bear a bad character; becauſe poſſeſſion, even with an *unjuſt* man, argues property; and ſuſpicion, or probable conjecture, loſe all force in any caſe where a legal argument can be urged. Where it is evident, however, that a perſon of ſuch appearance as the ſeller is not likely to be the proprietor of her, it is moſt prudent on that account to avoid buying her. Nevertheleſs, if the purchaſe be made, there are hopes of its being lawful, becauſe of its being ſupported by a legal argument.

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* Becauſe in this caſe the *mud* or *manure* is the article ſold, the ordure being merely a dependant.

† Arab. *Adil*, in oppoſition to *Faſik*.

but if the ſeller be a *ſlave*, precaution muſt be uſed.

If the perſon who offers the female ſlave to ſale be a ſlave, male or female, in that caſe the other muſt neither accept nor purchaſe her until he enquire into the circumſtances; becauſe, as *property* cannot be a *proprietor*, it is evident that ſome other is the proprietor of her. If, however, the ſeller inform him that "his maſter had licenced "him to ſell her," his word may in that caſe be taken, provided he be upright and truſtworthy: but if he be otherwiſe, the purchaſer muſt be guided by probable opinion; and if he have not the means of forming any opinion of him, whether good or bad, he muſt not in that caſe purchaſe her, or admit his allegation concerning her.

A woman may marry (after obſerving her *Edit*) on receiving authentic information of her widowhood or divorce.

If a perſon of an upright and truſty character inform a woman that her huſband who was abſent had died, or that he had divorced her thrice,—or, if a perſon of a *reprobate* character deliver her a letter from her huſband, wherein he acquaints her of his having divorced her, and ſhe, not knowing for certain that the letter was written by her huſband, ſhould however be led to think ſo,—in either of theſe caſes ſhe may lawfully obſerve her *Edit*, and then marry;—becauſe in this inſtance a circumſtance deſtructive of the former marriage has occurred without any perſon appearing to contradict it. In the ſame manner, alſo, if a woman inform a man that her huſband had divorced her, and that the ſtated period of her forbearance had elapſed, the man may lawfully marry her. If, alſo, a woman inform her former huſband who had divorced her thrice, that "after the lapſe of her "*Edit* ſhe had married another, with whom ſhe had cohabited, and "that having divorced her ſhe had again completed her *Edit* from "that divorce," the firſt huſband may in that caſe lawfully marry her again. The law is alſo the ſame where a woman informs a perſon that, having been a ſlave, ſhe had received her freedom.

If a perſon inform a woman that her marriage had been originally unlawful, inaſmuch as her huſband was at that time an *apoſtate*, or her *foſter-brother*, his word is not in that caſe to be credited, unleſs confirmed by the evidence of two men, or of one man and two women. So likewiſe, if a perſon inform another that his wife had been an apoſtate at the time of marriage, or that ſhe is his foſter-ſiſter, he is not in that caſe permitted either to marry the ſiſter of that woman, or to marry other four women, until the information ſo given be fortified by the atteſtation of two upright men. For here the huſband is informed of an illegal circumſtance coexiſtent with the marriage; whereas his execution of the contract of marriage is an argument in favour of its validity, and a denial of its illegality; and hence the information of the other is apparently contradicted. The caſe is otherwiſe, however, if a perſon, having married a child, ſhould be informed that ſhe had afterwards ſucked the milk of his mother or ſiſter; for the information ſo given is to be believed, ſince here the bar to the marriage is ſubſequent to, and not co-exiſtent with, the contract; and the execution of the contract, being antecedent to the circumſtance of its illegality, does not therefore afford any proof of its non-exiſtence; whence the information is not controverted.

Information tending to annul a marriage, muſt not be credited unleſs ſupported by teſtimony.

If a girl, ſo young as to be unable to give any account of herſelf, being in the poſſeſſion of a man who aſſerts her to be his property, ſhould be afterwards, when ſhe arrives at the age of maturity, met in another city by a man who formerly knew her, and tell him that "ſhe is a free woman," he is not, on the ſtrength of her word, permitted to marry her, as there is an argument againſt the truth of it, namely, her having been in the poſſeſſion of another.

A man is not at liberty to [illegible] him that ſhe is free.

A *Muſſulman* is not allowed to pay his debts by the ſale of wine; but a *Chriſtian* may pay his debts in this manner.

If a *Muſſulman*, involved in debt, ſhould ſell wine, it is abominable in his creditor to receive payment in the money ſo obtained; whereas, if the debtor were a *Chriſtian*, it would be allowable ſo to do. The reaſon of this diſtinction is, that in the former inſtance the ſale was invalid, as wine is not valuable to *Muſſulmans*, and the price of it being therefore the property of the purchaſer, cannot be lawfully received in payment. In the latter inſtance, on the contrary, the ſale was lawful, wine being a valuable commodity amongſt *Chriſtians*; and as, conſequently, the price of it is the property of the ſeller, the diſcharge of a debt from ſuch price is lawful.

It is abominable to monopolize the neceſſaries of life; or to foreſtall the market:

It is abominable to monopolize* the neceſſaries of life, and food for cattle, in a city where ſuch monopoly is likely to prove detrimental. So likewiſe is it abominable to foreſtall†; as where people leave a city to meet a caravan with a view to purchaſe goods and lay them up. This, however, is immaterial, when it tends not to the injury of any one. The argument, in this caſe, is a tradition of the prophet, who ſaid "*Bleſſed is the* JÂLIB, *and accurſed is the monopolizer.*" (By *Jâlib* is to be underſtood a merchant who brings camels, goats, and ſo forth, for ſale.) Another argument is, that grain is connected with the rights of every one, whence the withholding it from ſale is an invaſion of the general rights of mankind, and an occaſion of ſcarcity in their neceſſary food. Such an act is therefore abominable where the effects of it are extended to the people; as is the caſe when the monopoly is made in a ſmall city. It is otherwiſe, however, where it carries not along with it any ſenſible detriment to the people, as where it is done in a *large* city. The law is ſimilar in the caſe of foreſtalling. The learned, however, remark that this is where the purchaſers neither conceal from the merchants the price current of the market, nor deceive them in it; for if they either conceal or deceive them in the eſtabliſhed prices, the anticipation of the market is in ſuch caſe abominable, whether it be hurtful in its conſequences or otherwiſe. The reſtriction of the term *Ibtikâr*, or monopoly, to the neceſſaries of life and the food of animals is according to *Haneeſa*. *Aboo Yooſaf* has ſaid that the hoarding of any thing, the detention of which from circulation produces bad conſequences, although it be ſuch articles as gold, ſilver, or cloth, comes equally within the definition of a monopoly. It is reported from *Mohammed*, on the contrary, that the withholding of cloth from the market does not conſtitute a monopoly. It therefore appears that, according to *Aboo Yooſaf*, regard is paid to the *actual* detriment in determining the monopoly, as that is the cauſe of its being abominated; whereas, according to *Haneeſa*, regard is paid to the *particular* detriment. Decrees paſs according to the latter opinion. It is to be obſerved that, if the period of detention be ſhort, it is not a monopoly, as not being then attended with any detriment. If, on the contrary, the period be long, it becomes an abominable monopoly, as it then induces detriment. Some have ſaid that by a *long* period is to be underſtood at leaſt forty days, becauſe of a ſaying of the prophet, "*Verily, whoſo-*" *ever hoards victuals for the ſpace of forty days is at variance with*" GOD, *and* GOD *is at variance with him.*" Others have ſaid that a *month* is a long ſpace, and that any time leſs is a *ſhort* ſpace; and that the degree of guilt riſes in proportion to the neceſſities of the people, and the effect of the monopoly in producing a famine. Others, again have ſaid, that although there be a fixed period for rendering it puniſhable in this world, ſtill it is criminal, however ſhort the period may be. In ſhort, it is not good to trade * in grain, or commodities of that nature.

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* Arab. *Ihtikàr*. It is explained in the text to ſignify, in its literal ſenſe, the laying up of any thing; and in the language of the LAW, the purchaſing of grain, or other neceſſaries of life, and keeping them up with a view to enhance the price.

† Arab. *Talàkkee*.

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* By *trading* is not here to be underſtood ſimple *purchaſe* and *ſale*, but the uſual practice of merchants in keeping up their commodities, and watching the turns of the market, in order to ſell to the greateſt advantage.

but a perſon
may mono-
[illegible] the
[illegible]

or what he
brings from a
diſtant place.

If a perſon ſhould hoard a quantity of grain, being the product of his own cultivation, or which he had brought from another city,—in either of theſe caſes it is not deemed an abominable monopoly:—it is not ſo in the firſt caſe, becauſe ſuch product being an unmixed right of his own, without any relation to that of other people, he is therefore permitted to hoard it up; and in the ſame manner as it is lawful for him not to cultivate the ſeed, ſo is it lawful for him not to ſell the product:—nor is it ſo in the ſecond caſe, according to the opinion of *Haneefa*, the reaſon in ſupport of which is, that the rights of the people extend only to what is collected in the city, or what is brought thither from its dependances. *Aboo Yooſaf*, on the contrary, deems this practice abominable, becauſe the tradition recorded on this head is abſolute. *Mohammed*, alſo, has ſaid that every place from which grain is *frequently* brought to a particular city may be deemed a dependancy of it; and that a monopoly of whatever may be brought from ſuch places is forbidden, as the rights of the people are connected with it. It is otherwiſe, however, where goods are brought from a *diſtant* place, ſuch as it is not cuſtomary to bring them from; ſince in that caſe the rights of the community are not concerned.

Sovereigns
muſt not fix
prices,

except in
caſes of neceſ-

It is not the duty of ſovereigns to eſtabliſh fixed prices to be paid by the community; becauſe the prophet has forbidden this, ſaying "*Eſtabliſh not prices, as theſe are regulated by* God." Beſides, the price is the right of the merchant, and the meaſure of it is therefore left to him; and ſovereigns are not entitled to invade any ſuch right, except where the welfare of the community is concerned, as ſhall preſently be made appear.

A monopo-
lizer, upon
information,
muſt be re-
quired to ſell
his ſuperflu-
ousproviſions.

If a perſon guilty of a monopoly be brought before the *Kázee*, he muſt direct him to ſell whatever he may have laid up more than is amply ſufficient for the ſubſiſtence of himſelf and family, and muſt prohibit him from the like practice in future;—and if, after this, he ſhould again monopolize, the *Kázee* may then chaſtiſe him at his own diſcretion.

A combina-
medіedby the
magiſtrate
fixing a rate.

If victuallers, taking advantage of the neceſſity of the people, raiſe the market to an exorbitant rate, and the *Kázee* be otherwiſe unable to maintain the rights of the people, he may in that caſe regulate the prices, with the aſſiſtance of men of ability and diſcernment.—Notwithſtanding this, however, if they ſhould continue to ſell their grain at a rate exceeding the fixed ſtandard, the *Kázee* muſt confirm the ſale, nor has he the power of annulling it. This, according to *Haneefa*, is evident; for he holds it unlawful to inhibit a freeman in this reſpect;—and ſo likewiſe, according to the two diſciples, unleſs the inhibition affect only ſome particular people, ſince (agreeably to their tenets) inhibition is not allowed where it is indefinite.

Is it lawful for a *Kázee* to ſell the grain of a monopolizer without his conſent?—Some ſay that upon this point there is a diverſity of opinion, in the ſame manner as in the caſe of ſelling the effects of a debtor;—whilſt others maintain that it is lawful in the opinion of all our doctors, becauſe *Haneefa* holds it juſt to inhibit a freeman, with a view to removing a common evil, as is the caſe in the preſent inſtance.

Arms muſt
not be ſold to
ious per-
ſons.

It is abominable to ſell arms in the time of ſedition to a perſon whom the ſeller knows to be a rebel, as this is a cauſe of evil. If, however, the ſeller ſhould not know the purchaſer to be engaged in the rebellion, he may then without blame ſell arms to him.

The crude
ju
m
for the pur-
poſe of
makingwine.

There is no impropriety in ſelling the juice of dates or grapes to a perſon whom the ſeller may know intends making wine of it; for the evil does not exiſt in the *juice*, but in the liquor, after it has been eſſentially changed. The caſe is different with reſpect to ſelling arms at a time of tumult, ſince in that inſtance the evil is eſtabliſhed, and exiſts in the original thing, arms being the inſtruments of ſedition and rebellion.

A houſe may be let to hire any where out of a city for the purpoſe of a pagoda or a church.

If a perſon let a houſe to hire in a village, or in the neighbourhood of a city, in order that the leſſee may convert it into a *pagoda*, or a Chriſtian church, or that he may ſell wine in it, it is immaterial, according to *Haneefa*. The two diſciples hold ſuch leaſe to be improper, as tending to promote ſin. The arguments adduced by *Haneefa* are, that the compact is formed with a view to obtain profit from the houſe, which becomes due immediately upon the delivery; that the guilt exiſts only in the act of the leſſee; and that, as he is a free agent, no crime of his can therefore be reflected upon the leſſor. The reaſon of reſtricting the place, in this inſtance, to a village, or the neighbourhood of a city, is becauſe it is illegal to let out a houſe in a city for any of the abovementioned purpoſes, as there the light of the *Muſſulman* religion is ſuppoſed to blaze, which is not always the caſe in other places. The learned, however, have ſaid, that this refers only to the neighbourhood of *Koofa*, becauſe many infidels reſide there: but that in any other place where the *Muſſulman* religion prevails it is unlawful. This latter opinion is the moſt authentic.

A *Muſſulman* may carry wine for an infidel, and receive wages for ſo doing.

If an infidel hire a *Muſſulman* to carry wine for him, and afterwards pay him for his labour, the money ſo obtained is lawful to the *Muſſulman*. The two diſciples have ſaid that it is abominable, as being the inſtrument of ſin, and likewiſe becauſe the prophet (according to the *Rawâyet Saheeh*) has denounced curſes upon ten ſeveral people who are concerned in wine, amongſt whom are they who *carry* it. The argument of *Haneefa* is, that the ſin lies only in the *drinking* of it, which is the act of a free agent; that the carrying it is no ways allied to the drinking of it; and that the object of the porter is not that another ſhould drink it, but only that he himſelf ſhould obtain the reward of his labour:—and with reſpect to the tradition above alluded to, it refers only to a caſe where the wine is carried with intent to promote ſin.

Rules reſpecting the ground and houſes at *Mecca.*

There is no impropriety in the ſale of the walls of the houſes at *Mecca*, but it is abominable to ſell the ground on which they ſtand. This is the opinion of *Haneefa.* The two diſciples have ſaid that the ground of *Mecca* may likewiſe be ſold; and it is alſo related that *Haneefa* accorded in this opinion; becauſe in the ſame manner as the houſes are property, ſo likewiſe is the ground. The real opinion of *Haneefa*, however, is that it is improper; becauſe the prophet has ſaid, " Mecca *is ſacred, and the houſes there can neither be ſold nor " inherited.*" *Mecca*, moreover, is ſacred, as being a dependancy of the *Kàba*, and the place where reverence is particularly ſhewn to it; whence it is not lawful either to hunt at *Mecca*, or to cut the thorns or graſs which grow there, (except when they have faded and become parched;) or to ſhake the leaves off the trees growing there.

It is abominable to let the ground at *Mecca*, becauſe the prophet has ſaid, " *Whoſoever hires out the ground of* Mecca *is guilty of uſury: " whoever has uſe for the ground at* Mecca, *let him reſide in it*; *and " whoever poſſeſſes more than is ſufficient for his own purpoſes, let him " beſtow it upon others.*"

If a perſon take from a merchant ſomething he may have occaſion for, and leave with him a certain number of *dirms* (for example) he is guilty of an abomination; becauſe, in thus taking what he wants, he derives an advantage from a *loan*, (namely, the money he leaves with the merchant;) and the prophet has prohibited us from taking intereſt on loans. He muſt therefore firſt depoſit the *dirms* with the merchant, and then take from him whatever he may want; as the money is in this caſe a *truſt*, and not a *loan*, inſomuch that the merchant is not ſubject to pay a compenſation in caſe of the loſs of it.

## SECT. VII.

### MISCELLANEOUS CASES.

The KORAN ought to be written with- ks or

IT is abominable to diſtinguiſh the ſentences of the KORAN with marks, or to inſert in it the points or ſhort vowels. Nevertheleſs the learned amongſt the moderns have ſaid that theſe diſtinctions are proper when made for the uſe of a foreigner.

Infidels may enter the ſacred moſque.

THERE is no impropriety in a *Polytheiſt** entering the ſacred moſque †. *Shafeï* held this to be abominable; and *Málik* has ſaid, that it is improper for ſuch to enter into any moſque.—The argument of *Shafeï* in ſupport of his opinion is, that GOD has ſaid in the KORAN, "ASSOCIATORS ARE IMPURE, AND THEREFORE MUST NOT "BE PERMITTED TO ENTER THE SACRED MOSQUE." Another argument is, that an infidel is never free from impurity, as he does not perform ablution in ſuch a manner as to work a purification; and an impure man is not allowed to enter into a moſque. The ſame arguments have been urged by *Málik*; but he extends them to any moſque. The argument of our doctors on this point is drawn from a tradition that the prophet lodged ſeveral of the tribe of *Sakeef*, who were infidels, in his own moſque. Beſides, as the impurity of an infidel lies in his unbelief, he does not thereby defile a moſque. With reſpect, moreover, to the text above quoted, it merely alludes to infidels entering a moſque in a haughty and forcible manner, and to a cuſtom which was practiced in the days of ignorance of walking about the moſque naked.

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* Arab. *Moſhirrak*, i. e. an *aſſociator*, including all who deny the unity of the Godhead, and therefore applying to [trinitarian] *Chriſtians* as well as to *Idolaters*.

† This is a moſque in *Mecca*, ſo called becauſe the prophet moſt frequently offered up prayers in it.

**It is abominable to keep eunuchs.**

It is abominable for a *Muſſulman* to keep *eunuchs* in his ſervice, as the employment of them is a motive with men for reducing others to a like ſtate, a practice which is proſcribed in the ſacred writings *.

**It is allowed to caſtrate cattle.**

It is not abominable to caſtrate cattle, or to make a horſe copulate with an aſs, as theſe tend to the benefit of mankind. Beſides, it is related, in the *Nakl Saheeh*, that the prophet rode upon a mule, which, if ſuch promiſcuous procreation of animals had been prohibited, he would never have done, as thereby a door would have been opened to ſin.

**A *Jew* or *Ch*[illegible] be during ſickneſs.**

There is no impropriety in viſiting a *Jew* or *Chriſtian* during their ſickneſs, as this affords them a kind of conſolation; and the LAW does not prohibit us from thus conſoling them. Nay, we are told, in the *Nakl Saheeh*, that the prophet viſited a *Jew* who lay ſick in his neighbourhood.

**Vain i**

It is abominable that a perſon, in offering up prayers to God, ſhould ſay, "I beſeech thee, *by the glory of thy heavens!*" or "*by the ſplendor of thy throne!*" for a ſtile of this nature would lead to ſuſpect that the Almighty derived glory from the heavens; whereas

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* That is, in the **Koran**, which is termed, by way of pre-eminence, the *Sharra*, LAW.

the heavens are created, but God, with all his attributes, is eternal and immutable. It is, however, recorded by *Aboo Yooſaf*, that there is no impropriety in this, (an opinion which has been likewiſe adopted by *Aboo Lais*,) becauſe it is related of the prophet that he offered up a ſimilar prayer to God. Our doctors, on the other hand, have urged that this tradition is uncertain; and that to abſtain from whatſoever is *ſuſpected* of being wrong is moſt prudent and adviſeable.

It is abominable to ſay, in a prayer, "I beſeech thee, O God, *by the* RIGHT *of*" (any particular perſon,) or "*by the* RIGHT *of*" (any of the prophets;) becauſe none of his creatures is poſſeſſed of any right with reſpect to the Creator.

*Gaming* is diſallowed.

It is an abomination to play at cheſs, dice, or any other game; for if any thing be ſtaked it is *gambling*, which is expreſsly prohibited in the Koran; or if, on the other hand, nothing be hazarded, it is uſeleſs and vain. Beſides, the prophet has declared all the entertainments of a *Muſſulman* to be vain excepting three; the breaking in of his horſe; the drawing of his bow; and the playing and amuſing himſelf with his wives. Several of the learned, however, deem the game of cheſs to be allowed, as having a tendency to quicken the underſtanding; which opinion has alſo been aſcribed to *Shafeï*.—Our doctors have founded their judgment in this particular on a ſaying of the prophet, "*Whoſoever plays at cheſs or dice does, as it were, plunge his hand into the blood of a hog.*" Moreover, plays of this nature are apt to withhold men from the adoration and worſhip of God at the ſet periods; and the prophet has ſaid, "*Whatſoever tends to relax men in their duty to* God *is conſidered in the ſame light with the practice of gaming.*"—It is alſo proper to remark, that if a man play at cheſs for a ſtake, it deſtroys the *integrity* of his character, and renders him a *Fáſik*, or *reprobate*; but if he do not play at it *for a ſtake*, the integrity of his character is not affected. *Aboo Yooſaf* and *Mohammed* hold it abominable to ſalute any perſon that is engaged in play; ſince, in thus refraining, our abhorrence of gaming may be expreſſed. *Haneefa*, on the contrary, holds it proper, as being the means of diverting the parties from their game.

Preſents (ex-
ce
oi
ments may be
acceptedfi
a mercantile

THERE is no impropriety in a perſon receiving a preſent from a ſlave who is a merchant; or in accepting from him an invitation to an entertainment; or in borrowing his carriage: but it is abominable to receive from him a preſent either of cloth or money.—What is here advanced proceeds upon a favourable conſtruction of the law. Analogy would ſuggeſt that there is no difference whatever between his invitations and his preſents conſiſting of cloth or money;—in other words, they are all equally abominable in the acceptance, as being all *gratuitous* acts, to which a ſlave is not competent.—The reaſon, however, for a more favourable conſtruction of the law, in this particular, is that the prophet accepted a preſent from *Soliman* when he was a ſlave, and from *Bareerá* when ſhe was a *Mokátibá*. A number of the companions, alſo, accepted an invitation from the freedman of *Aboo Ruſſaid* whilſt he was yet a ſlave. There is, moreover, a ſort of neceſſity which operates upon a mercantile ſlave, and obliges him to give into theſe ſeveral cuſtoms. Thus, for inſtance, if a perſon, having gone to his ſhop with a view to purchaſe wares, and having requeſted of him ſomething to drink, ſhould be refuſed by him, in that caſe he would conſequently incur the imputation of covetouſneſs, few people would frequent his ſhop, and his trade would thereby be ruined. Beſides, when a ſlave is permitted to trade, he implicitly poſſeſſes all the power of a merchant in its full extent. But he is under no neceſſity of *clothing* people, or of diſtributing *money* to them; and hence it is not allowed to him to perform ſuch acts, in conformity with what analogy ſuggeſts upon this ſubject.

General rules with reſpect to infant orphans or foundlings.

If a perſon beſtow any thing in gift or alms upon an orphan* under the protection of a particular perſon, it is lawful for that perſon to take poſſeſſion of ſuch gift or alms on his behalf.—It is here proper to remark, that acts in regard to infant orphans are of three deſcriptions.—I. Acts of *guardianſhip*, ſuch as contracting an infant in marriage, or ſelling or buying goods for him; a power which belongs ſolely to the *Walee*, or natural guardian, whom the LAW has conſtituted the infant's ſubſtitute in thoſe points.—II. Acts ariſing from the *wants* of an infant; ſuch as buying or ſelling for him on occaſions of need; or hiring a nurſe for him, or the like; which power belongs to the maintainer of the infant, whether he be the brother, uncle, or (in the caſe of a *foundling*,) the *Mooltakit*, or *taker-up*, or the *mother*, provided ſhe be maintainer of the infant; and as *theſe* are empowered with reſpect to ſuch acts, the *Walee*, or natural guardian, is alſo empowered with reſpect to them in a ſtill ſuperior degree;—nor is it requiſite, with reſpect to the *guardian*, that the infant be in his immediate protection.—III. Acts which are purely *advantageous* to the infant, ſuch as accepting preſents or gifts, and keeping them for him; a power which may be exerciſed either by a *Mooltakit*, a brother, or an uncle, and alſo by the infant himſelf, provided he be poſſeſſed of diſcretion, the intention being only to open a door to the infant's receiving benefactions of an advantageous nature.—The infant, therefore, is empowered in regard to thoſe acts, (provided he be diſcreet,) or any perſon under whoſe protection he may happen to be.

It is not lawful for the *Mooltakit* [taker-up] of a foundling to hire him out in ſervice; nor is it lawful for an uncle to do ſo by his infant nephew, although he be under his immediate care. It is otherwiſe with a *mother*; for ſhe may lawfully let her infant child to hire, provided ſhe have immediate charge of him; becauſe a mother is empowered to uſe the ſervices of her infant child by employing him, without tendering him any return,—whereas a *Mooltakit* or an uncle have not this power.—If the child ſhould of himſelf enter into an engagement of ſervice, it is not valid, as there is a poſſibility of its tending to his prejudice.—Still, however, if after having hired himſelf out he ſhould fulfil his engagement, it is then valid; becauſe in thus confirming it his advantage only is conſulted; and he is conſequently entitled to the hire agreed for.

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* Arab. *Lakeet*. Properly, a *foundling*. (See Vol. II. p. 257.)

not fix an iron
collar on the
neck of his

It is abominable for a perſon to fix an iron collar on the neck of his ſlave in ſuch a manner as to deprive him of the power of moving his head, according to the cuſtom of tyrants; becauſe a puniſhment of this nature is like the torments of the damned, and is conſequently unlawful, in the ſame manner as ſcorching with fire.

but he may
impriſon hi-

A Mussulman may impriſon his ſlave; for as a cuſtom prevails amongſt the *Muſſulmans* of confining people who are mad or ſeditious, ſo in a ſimilar manner it is lawful for a perſon to confine a ſlave, that he may prevent his abſconding, and thus ſecure his property.

Glyſters are

It is not abominable to apply a glyſter in a caſe of need; becauſe medical practices are approved, in the united opinion of all our doctors, as well as by the traditions of the prophet. An application of this kind is, moreover, equally proper, whether it be adminiſtered to a man or woman. It is not allowable, however, to have recourſe to any forbidden thing, ſuch as *wine*, or the like; for it is unlawful to ſeek health by unlawful means.

The allowances of a

It is not improper to defray the allowances of a *Kázee* from the public treaſury, becauſe the prophet nominated *Atáb Bin Oſaid* be defrayed from the public treaſury.

*Kázee* of *Mecca*, appointing him his allowance from the public treaſury there; and he alſo nominated *Alee* to be *Kázee* of *Yemn*, appointing him his allowance from the treaſury there.—Beſides, as a *Kázee* is, by the nature of his office, confined to the buſineſs of guarding the rights of *Muſſulmans*, his maintenance is therefore drawn from their property, (and the public treaſury is the property of the *Muſſulman* community;) for a confinement to any particular office or duty entitles to maintenance; as holds in the caſe of an *executor*, or a *Mozáribat* factor who travels with the ſtock.—It is to be obſerved, however, that the propriety of the *Kázee* receiving his allowance from the public treaſury is only where he takes it in a ſatisfactory manner, without any condition; for if he ſhould refuſe to undertake the office, unleſs the ſovereign allow him a certain ſalary, it is unlawful; becauſe he in ſuch caſe demands a reward for the diſcharge of an act of piety; for ſuch the office of a *Kázee* is; nay, the exerciſe of juriſdiction is the nobleſt ſpecies of devotion.—It is alſo proper to remark, that if a *Kázee* be *poor*, it is moſt eligible, or rather *incumbent* on him to receive his maintenance from the public treaſury; for otherwiſe he would be unable to ſupport the dignity of his office, from a neceſſary attention towards the concerns of his ſubſiſtence. If, on the contrary, he be *rich*, ſome deem it moſt eligible that he ſhould *not* receive his allowance from the public treaſury; whilſt others maintain that it is incumbent on him ſo to do. The latter is the better opinion; becauſe otherwiſe the office might be rendered low and contemptible; and alſo becauſe, if an indigent perſon ſhould ſucceed a rich *Kázee*, it would then be difficult for him to procure a ſalary, as that had been, perhaps, for a long time relinquiſhed.

Caſe of a *Kázee* diſmiſſed after having received his allowance.

If a *Kázee*, having poſſeſſed himſelf of one year's allowance, ſhould be diſmiſſed from his office before the expiration of that year, there is in this caſe a diſagreement amongſt our doctors, in the ſame manner as they have differed in opinion where a wife dies in a ſimilar predicament *. The better opinion, however, is that he ſhould reſtore the exceſs.

**Female ſlaves may travel without being attended by a kinſman.**

THERE is no impropriety in a female ſlave or an *Am-Walid* travelling without being attended by a kinſman; becauſe a ſtranger (as has been already explained) is conſidered the ſame as a kinſman with reſpect to looking at or touching a female ſlave; and an *Am-Walid* is alſo a ſlave, as being *property*, although ſhe cannot be ſold.

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* See Vol. I. p. 399.

# HEDAYA.

## BOOK XLV.

## *Of the* CULTIVATON *of* WASTE LANDS*.

Definition of *Mawàt*,

MAWÀT (which is here rendered *waſte land*) ſignifies any piece of ground incapable of yielding advantage, either from a want of water, an inundation, or any other cauſe, ſuch as prevents tillage; and it is termed *Mawàt*, or *dead*, becauſe, like the dead, it is of no uſe.

and deſcription of the land ſo termed.

ANY piece of ground which, from a long time, has lain waſte without belonging to any perſon, or which has been formerly the property of a *Muſſulman*, who is not then known, and is likewiſe ſo far removed from a village that, if a perſon call out from thence, his voice cannot there be heard, is termed *Mawât*. The compiler of the *Hedâya* remarks that this is the explanation of it as delivered by *Kadooree*. It is reported from *Mohammed* that it is requiſite the ground be neither the property of a *Muſſulman* nor a *Zimmee*; and likewiſe, that it be of no uſe; in which caſe it becomes abſolutely *Mawât*: but that ground which is the property either of a *Muſſulman* or a *Zimmee* is not *Mawât*.—If the proprietor be unknown, the ground in the mean time belongs to the *Muſſulman* community;—but if he afterwards appear, it muſt be reſtored to him, and the cultivator is reſponſible for whatever damage he may have occaſioned.—With reſpect to the ground being diſtant from a village, as mentioned by *Kadooree*, *Aboo Yooſaf* is of opinion that this is a condition, for this reaſon, that where the ground is contiguous to a village it cannot be ſaid to be entirely uſeleſs to the inhabitants of it. *Mohammed* holds it ſufficient that the villagers do not in reality make uſe of the ground, whether it be contiguous or not. The ſame opinion has been delivered by the *Imâm* ſtiled *Khahir Zàdà*: but *Shims al Aymà*, the *Siruckſhian*, has adopted the opinion of *Aboo Yooſaf*.

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* Arab. *Ahya-al-Mawàt*, meaning, literally, *the revival of the dead.*

**The cultiva- [illegible] the cultivator with a pro- perty in them.**

WHOSOEVER cultivates waſte lands, with the permiſſion of the chief, obtains a property in them; whereas, if a perſon cultivate them *without* ſuch permiſſion, he does not in that caſe become proprietor, according to *Haneefa*. The two diſciples maintain that, in this caſe alſo, the cultivator becomes proprietor; becauſe of a ſaying of the prophet, "*Whoſoever cultivates waſte lands does thereby acquire* "*the property of them*;" and alſo becauſe they are a ſort of common goods, and become the property of the cultivator in virtue of his being the firſt poſſeſſor; in the ſame manner as in the caſe of ſeizing game, or gathering firewood. One argument of *Haneefa* on this point is a ſaying of the prophet, "*Nothing is lawful to any perſon but what is* "*permitted by the* IMÂM:"—and with reſpect to the ſaying quoted by the two diſciples, it is to be conſtrued merely in *judicial permiſſion* (for the prophet was himſelf an *Imâm*,)—in the ſame manner as where he ſaid, " *Whoever kills an infidel is entitled to his armour.*"—Beſides, all waſte lands are plunder, ſeeing that the *Muſſulmans* acquired the poſſeſſion of them by conqueſt: and hence no perſon can aſſume a property in them without the conſent of the *Imâm*, as holds in all caſes of plunder.

*Tithe* only is due from land ſo cultivated,

with tribute water.

If a perſon cultivate waſte land, a *tithe* only is due from it, for it is unlawful to charge a *Muſſulman* with tribute in the beginning: but if the land be moiſtened with tribute water, tribute may lawfully be impoſed, as it then becomes due on account of the water.—If, alſo, a perſon cultivate waſte lands, and afterwards relinquiſh them, and another then cultivate them, ſome have ſaid that the ſecond cultivator is beſt entitled to the property; for the firſt was owner of the *profits* merely, and not of the land itſelf; and therefore, upon his relinquiſhing it, the ſecond obtains a ſuperior claim. It is certain, however, that the firſt cultivator may reſume the lands from the ſecond, becauſe he is proprietor of them in virtue of having brought them to a ſtate of cultivation, (as appears from the ſaying of the prophet quoted in the preceding caſe,) and does not forfeit his property by the relinquiſhment.

In the cultivation of the circumjacent

left to it.

If a perſon cultivate a piece of waſte land, and four others afterwards ſo cultivate the circumjacent ground as to obſtruct the paſſage into his property, it is reported, from *Mohammed*, that his road is to lead through the ground of him who cultivated laſt; for, after three of the ſides bordering upon his property had been cultivated, the other of conſequence remains for his ingreſs and egreſs; and therefore the perſon who cultivates it wilfully aims at the deſtruction of his right.

# WASTE LANDS.

A *Zimmee* acquires a property in the land he tivates, well as *Muſſi*

If a *Zimmee* cultivate waſte lands, he becomes proprietor of them, in the ſame manner as a *Muſſulman*; becauſe cultivation endows with a right of property. (*Haneefa*, however, holds that the conſent of the *Imâm* is requiſite.)—A *Zimmee* and a *Muſſulman*, therefore, are alike in this reſpect, in the ſame manner as in all other points of property.

If the land be not cultivated for three years after it is marked off, it may be transferred by the *Imâm*.

If a perſon circumſcribe a piece of ground, and ſet marks upon it with ſtones or ſuch like, and keep it in that ſtate for the ſpace of three years without cultivating it, the *Imâm* may in that caſe lawfully reſume it, and aſſign it to another; becauſe the ground was given to the firſt with a view to his cultivating it, ſo that a benefit might enſue to the *Muſſulmans* from the collection of the tithe and tribute; and as he neglected this, it is therefore incumbent on the *Imâm* to deliver it over to another, that the end for which it was given to the firſt may be anſwered.—Moreover, the encompaſſing of the ground with ſtones, &c. does not, like cultivation, create a right of property, ſince by *cultivating* the land is underſtood rendering it productive, whereas the encompaſſing it with ſtones ſerves merely to deſignate the boundaries: the land, therefore, ſtill remains unappropriated as before.—With reſpect to the ſpecification of three years, as here mentioned, it is founded on a ſaying of *Omar*, "*The marker has no right after three* "*years have elapſed.*"—It alſo proceeds on this principle, that three periods of time are requiſite for a perſon who marks lands; one, that he may go to his place of abode after having ſet the marks; another, that he may there ſettle his affairs; and a third, that he may return to his land; and each of theſe ſeveral periods is determined at a year, as it is probable any leſs diviſion of time, ſuch as an hour, a day, or a month, might not ſuffice to anſwer the purpoſe. If, therefore, after the elapſe of three years the marker return not to his lands, it is preſumed that he has relinquiſhed them.—Lawyers remark that what is here advanced proceeds upon a principle of equity; but that, in ſtrictneſs of law, if a perſon cultivate the lands which another has marked before the elapſe of the period above mentioned, he becomes the proprietor of them, as in this caſe he is the cultivator, and not the other. It is here proper to obſerve that waſte lands may be marked by other modes beſides ſetting ſtones, ſuch as by ſurrounding them with the branches of trees; by burning the underwood and thorns which may be growing upon the lands; or by collecting them together and ſcattering them, mixed with a little earth, about the borders, without carrying them ſo uniformly round as to form a continued boundary; or, laſtly, by digging a trench one or two yards in width.

Manner of marking off waſte land.

*Cultivation* is eſtabliſhed by digging and watering the ground,

IT is related, as an opinion of *Mohammed*, that if a perſon dig up and water a piece of waſte land, he is then the *cultivator* of it; whereas, if he dig it up or water it ſingly, he is only held to have ſet a mark upon it.—In the ſame manner, if he dig a trench or ditch without watering the land, it is conſidered only as marking; whereas, if he moiſten it with water, after digging a trench, it is cultivation. If, moreover, a perſon raiſe an encloſure round the land ſo high as to be a dam to the water, he is held to have cultivated it; and ſo likewiſe if he ſow ſeed in it.

encloſing it, or ſowing it with ſeed.

It muſt not [illegible]

IT is not permitted to cultivate a piece of waſte land immediately bordering upon lands that are in a flouriſhing ſtate; as it is requiſite that a ſpace be left for the uſe of the cattle of the other proprietor, and alſo for piling up his ſtacks, whence ſuch land does not come under the deſcription of *waſte* any more than a river or a highway;—and accordingly, our doctors have ſaid, that it is not lawful for the *Imám* to beſtow on a perſon any article of indiſpenſable uſe to the *Muſſulmans*, ſuch as a ſalt-pit, or a well from which the people draw water to drink.

A *ſpace* is [illegible]

WHOEVER digs a well in waſte land is entitled to a ſpace or piece of land * round it. If, therefore, the well be dug for the uſe of camels, a ſpace of forty yards is annexed to it.—This is related in the traditions. Several of our doctors have conſtrued the forty yards to mean the *aggregate* ſpace. The better opinion, however, is that forty yards are annexed to each ſide of the well; for as many lands are of a ſoft and humid ſoil, it might happen that if another perſon ſhould dig a well at a leſs diſtance from the firſt than forty yards, the water of the one might ooze through the earth and communicate with the other. If the well be dug with a view to drawing water from it by means of camels or other animals*, in that caſe the ſpace of ſixty yards is annexed, according to the two diſciples. *Haneeſa* holds that in this caſe likewiſe only forty yards are allowed.—The arguments of the diſciples upon this point are twofold.—First, a ſaying of the prophet, "*The precincts of a fountain are five hundred yards, of a well* "*from which camels may drink forty, and of a well from which water* "*is drawn ſixty yards.*"—Secondly, there is a neceſſity that a conſiderable ſpace be annexed to a well of this nature, ſince the camels may be required to be led to a diſtance from it, as the rope by which the water is drawn up is often of long extent; but where wells are ſo made that the water may be taken out by the hand, it is not neceſſary that any great ſpace be allotted on this account; and therefore a difference ſhould certainly be made between the two ſorts of wells. *Haneeſa* argues from the tradition before cited, in which forty yards are mentioned, without diſtinguiſhing between the two ſpecies of wells. The objection, moreover, ſtarted by the two diſciples may be obviated by making the camels revolve round the well with the rope, inſtead of driving them directly from it.

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* Arab. *Hareem*; meaning, literally, *prohibited to others*.

in waſte lands;

If the well have a fountain in it, the ſpace annexed to it is five hundred yards; becauſe of the tradition before quoted; and alſo, becauſe a large ſpace is here abſolutely requiſite; for as the fountain is brought out to water the ground, one ſpace is required through which the water may be conducted from the fountain; another for a reſervoir wherein the water may be collected; and a third for conveying the water from the reſervoir to moiſten the lands for cultivation. A conſiderable ſpace is therefore required; which is determined at five hundred yards, by the tradition; and this, according to the moſt authentic opinions, means five hundred yards on each ſide of the fountain; the yard meaſuring ſix ſpans.—(Some have ſaid that the annexation of five hundred yards to a fountain is only in the country of *Arabia*, where the ſoil is hard; but that in our country, where it is ſoft, a larger extent is required, as otherwiſe the water of one fountain might tranſude through the earth and communicate with that of another.)

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* See note in Vol. II. p. 377.

within the limits of which no other perſon is entitled to dig;

If a perſon attempt to dig a well within the limits of the proprietor of another well, in that caſe the other may prohibit him; becauſe the limits of his well are his property, (as has been explained,) and therefore none has a right to encroach upon them. If, alſo, a perſon ſhould actually dig a well within the limits of another, the firſt proprietor has in that caſe the option either of filling it up himſelf gratuitouſly, or of forcing the other ſo to do.—Some have ſaid that, in this caſe, the firſt proprietor is to take a compenſation for the damage from the other, and then to fill up the well himſelf;—in the ſame manner as where a perſon deſtroys a wall the property of another, in which caſe he muſt make reparation to the proprietor, who muſt rebuild it himſelf. This is approved. It is related in *Khaſâf*'s treatiſe upon the duties of a *Kâzee*, that the damage, in this inſtance, muſt be computed by a compariſon of the value the firſt well bore before the other was dug, with what it bears afterwards; the difference ſhewing the loſs ſuſtained.

or, if any do ſo, he is reſponſible for ſuch acci-

There is no reſponſibility for any thing which may happen to be deſtroyed by falling into the firſt of the two wells, as the proprietor, in digging it, was not guilty of any treſpaſs.—This is evident, in the

opinion

dents as it may occaſion.

opinion of *Haneefa*, if he dug it with the conſent of the *Imâm*; and alſo in the opinion of the two diſciples, whether it was done with the conſent of the *Imâm* or not;—according to *Haneefa*, becauſe the digging of a well, in this inſtance, was the ſame as the ſetting of marks, which may be done without the conſent of the *Imâm*, although the property cannot be acquired without his permiſſion.—If, on the contrary, any thing be deſtroyed by falling into the *ſecond* well, it muſt be atoned for, as the proprietor of this well has been guilty of a treſpaſs in having dug upon the property of another. If, on the other hand, a perſon dig a well bordering on the precincts of another, without however encroaching upon it, and the water of that other ſhould then decreaſe, he is not liable to make any compenſation, as he is not here guilty of any tranſgreſſion.—In this laſt caſe, moreover, the ſecond digger is entitled only to the ground on three ſides of his well, as the ground on the ſide of the firſt well is the property of the firſt digger.

A ſpace is alſo appropriated to a *water-courſe*

WHOEVER digs a channel * for conducting water to any place, has a ſpace annexed to it, according to his want. It is related by *Mohammed* that an aqueduct is the ſame as a well, ſo far as regards the annexing of land to it.—Some ſay that this is the doctrine of the two diſciples; but that, according to *Haneefa*, no ſpace is allowed, except when the water appears above ground; for as an aqueduct is in fact merely a *rivulet*, it is therefore ſubject to the ſame rules. Several doctors have, however, maintained that when an aqueduct appears above ground, it is then conſidered in the ſame light as a ſpring or fountain; and that conſequently the ſame quantity of land is annexed to it, namely, five hundred yards.

or to a *tree*

IF a perſon plant a tree in a waſte ſpot of land, he is entitled to in land.

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* Arab. *Kanàt.* Perſ. *Kareez.* It is generally underſtood to mean a *ſubterraneous* or *drain.*

a ſmall ſpace as an appendage to it; wherefore no other perſon is allowed to plant a tree on the ground within his precincts, as this ſpace is uſeful to him for collecting his fruits, and heaping them upon it. The ſpace allotted to a tree is the meaſure of five yards, agreeably to what occurs in the traditions upon that ſubject.

rted beds of rivers muſt not be cultivated.

Lands through which the *Euphrates*, the *Tigris*, or any ſimilar river formerly ran, muſt not be cultivated, if it be poſſible that the river may again run over them; as the people whoſe lands lie adjacent to the river in its former courſe have an intereſt in deſiring that the river may not be prevented from returning to it. If, however, the lands be not likely to be again overflowed, they are then held to be waſte, provided they do not adjoin to any cultivated ſpot;—becauſe ſuch lands are not the property of any one; for the ſuperiority of water repels all other ſuperiority; but as ſoon as the land appears above the water it becomes ſubject to the *Imâm*.

A ſpace is not allowed to an aqueduct running through another's land without proof of prior right.

Whoever has the property of an aqueduct, which runs through land belonging to another, is not (according to *Haneefa*) entitled to any adjacent ſpace, unleſs he produce evidence to prove his right.—The two diſciples, on the contrary, maintain that he is, in virtue of his property in the aqueduct, entitled to the banks on which people paſs, and which the earth thrown up by the excavation of it occupies. Some have ſaid that the difference of opinion in this caſe is founded on that which obtains where a perſon digs a canal in waſte lands by permiſſion of the *Imâm*; for in this caſe, according to *Haneefa*, he is not entitled to any ſpace; whereas the two diſciples maintain that he is ſo entitled, ſince he can derive no advantage from the canal unleſs he poſſeſs a ſpace annexed to it, as he muſt often be obliged to walk along the banks of it to clear away any incumbrances that may ſtop the courſe of the water, it being impracticable for a perſon, in the common courſe of things, to walk in the *middle* of it.—As, moreover, he is often neceſſitated to dam it with earth and clay, and it is impoſſible

poſſible for him to bring theſe from any diſtance without incurring an extraordinary expence; he is therefore entitled to a ſpace of ground, in the ſame manner as a perſon who digs a well.—The argument of *Haneefa* is, that the claim to any ſpace is repugnant to analogy, the right to it being eſtabliſhed, in the caſe of a well, ſolely on the ground of the precept before quoted. Beſides, the neceſſity for a ſpace, in the caſe of a well, is more urgent than in the caſe of a canal or aqueduct; for, in the latter, the uſe of the water may be enjoyed without any ſpace,—whereas, in the former, this is impoſſible, as the water muſt be pulled up by a rope, to effect which a ſpace is requiſite, as has been before explained. Hence there is an obvious difference between a well and a canal; and conſequently they can bear no analogy to each other. The reaſon for founding the caſe in queſtion on this is, that if the proprietor of the aqueduct be entitled to a ſpace of land, he is held to be ſeized of the ſaid ſpace as a dependancy of the aqueduct; and the evidence of the poſſeſſor is valid in caſe of a conteſt; whereas if, on the contrary, he be not entitled to any ſpace, he is not held to be ſeized of it, and circumſtances therefore teſtify for the proprietor of the land; as ſhall ſhortly be explained.—If, however, the caſe in queſtion be conſidered ſeparately, and not as founded on the above, then the two diſciples argue that the ſpace is in the hands of the proprietor of the aqueduct, as he preſerves the water by means of it,—whence it is that the proprietor of the land is not entitled to break it down.—*Haneefa*, on the other hand, argues that the dependant land reſembles the other land of the proprietor, with reſpect both to appearance and ſubſtance:—with reſpect to appearance, becauſe it is on a level with, and joins to it; and with reſpect to ſubſtance alſo, becauſe it is of the ſame ſoil, and is equally capable of nouriſhing trees and vegetables; and circumſtances teſtify for him who is in poſſeſſion of what bears the greateſt reſemblance to the dependant ground, namely, the land adjacent to it;—in the ſame manner as where two people contend for a door-plank in the poſſeſſion of ſome other perſon, and which exactly quadrates with another that is poſſeſſed by one of the litigants; for in that caſe the *Kâzee* muſt adjudge ſuch plank to be the property of him who poſſeſſes the correſpondent one.—In reply to what the two diſciples further urge, it may be obſerved that the conteſt here does not hinge upon what was placed for the conſervation of the water [the banks,] but upon what is independant of it, and fit for producing trees, &c. Beſides, ſuppoſing that the proprietor of the aqueduct preſerves the water only on account of the dependant ſpace of land, it may be anſwered that the proprietor of the ground preſerves it only on account of the dependant ſpace of land likewiſe.—With reſpect, moreover, to what they urge, that "the proprietor of the land is not entitled to break down the "banks of the aqueduct," it is to be obſerved that this is not becauſe they are the *property* of the proprietor of the aqueduct, but merely becauſe he has an *intereſt* in them;—in the ſame manner as where a perſon is poſſeſſed of a wall, and another, having the property of a wall near it, lays beams acroſs both with the aſſent of the other; for in ſuch caſe the other has not afterwards the power of pulling down his own wall, ſince he muſt thereby injure the right of this perſon.

Differences of opinion concerning aqueducts.

It is related, in the *Jama Sagheer*, that if a perſon poſſeſs an aqueduct, having banks on each ſide, and adjacent to them a piece of land belonging to ſome other perſon, and the banks be not in the hands of any one, that is to ſay, be deſtitute of marks, ſuch as trees, ſtones, or the like, to determine the property, thoſe banks belong to the proprietor of the land, according to *Haneefa*;—whereas the two diſciples hold that they appertain to the proprietor of the river.—If, on the contrary, the mark of any perſon be left upon them, they are then unanimouſly of opinion that the marker has the better claim.—Still, however, they differ in opinion where there is a tree upon the banks, and it is not known who planted it; for *Haneefa* is of opinion that to plant a tree is the right of the proprietor of the ground, whilſt the two diſciples hold this to be the right of the proprietor of the aqueduct.

duct.—With reſpect, alſo, to throwing up earth, many have ſaid that there is a diſagreement; whilſt others have ſaid that this belongs to the proprietor of the aqeduct, provided he do not exceed the preſcribed bounds. With regard to walking upon the banks, ſome have ſaid that it is not permitted, in the opinion of *Haneefa*; whilſt others have ſaid that it is not prohibited, becauſe of there being a neceſſity for it. The learned *Aboo Jáfir* has ſaid that he would decree according to the opinion of *Haneefa* in the caſe of planting a tree,—and according to that of the two diſciples, in the caſe of throwing up earth. It is reported, from *Aboo Yooſaf*, that the width of the dependant ſpace of an aqueduct is half the breadth of the aqueduct; but according to *Mohammed* it is the whole breadth: and this opinion is the moſt favourable to mankind.—It is here proper to obſerve, that the ſubject reſolves itſelf into ſeveral ſections, treating of the caſes of *Shirbá*, or a right to water, whether derived from the poſſeſſion of land, or from other cauſes.

## SECT. I.

## *Of* WATERS.

All peopl have a rig u a o. [illegible] and alſo cattle;

If a perſon have the property of a canal, a well, or a reſervoir, he cannot prohibit either man or beaſt from drinking of it.—Here it is neceſſary to premiſe that water is of four kinds. I. The water of the ocean, which every perſon has a right to drink, or to carry away for the purpoſe of moiſtening his lands.—If, therefore, a perſon incline to dig a canal, and convey the water in it from the ocean to his land, no perſon has power to prevent him from ſo doing; for the enjoyment of the water of the ocean is common to every one, in the ſame manner as the light of the ſun or moon, or the uſe of the air.—II. The water of large rivers, ſuch as the *Oxus*, the *Euphrates*, or the *Tigris*, in which every perſon has an abſolute right to drink, and alſo a conditional right to uſe it towards moiſtening his lands;—that is to ſay, a perſon, if he cultivate waſte land, may dig a channel for the purpoſe of conveying water to it from the river, provided his doing ſo be not detrimental to the people: but if there be a probability of its being hurtful in its conſequences, (as if, by opening the banks, the water ſhould overflow the country and villages around,) in that caſe he is not permitted to dig a channel for the watering of his land, as the prevention of a public evil is a conſideration of greater moment.—Analogous to this, alſo, is the erection of a mill on the banks of a river; for the demolition of the banks by the mill is the ſame as by watering land.—III. Water in which ſeveral have a ſhare;—and in which, likewiſe, the right of drinking is allowed to every one; for it is recorded in the traditions that three things are common to all, namely, *water*, *graſs*, and *fire*. Beſides, wells, and the like, are not dug for the purpoſe of *preſerving* water; and hence the water of them is not the property of any one; for it is common, and as ſuch cannot be made a particular property until it be ſeparately kept and preſerved;—as holds with reſpect to a deer that only ſleeps upon a perſon's ground. There is, moreover, a neceſſity for eſtabliſhing this common right with regard to water, ſince it is impoſſible for every perſon to carry it along with him; and as a perſon may be in want of it for himſelf and his horſe, mankind would therefore be too much cramped if an unlimited uſe of it were not granted them. If, however, a perſon incline to bring water to moiſten the land he had cultivated from a river or canal which belongs to others, the proprietors may prevent him, as otherwiſe their right of watering* would be entirely deſtroyed.—IV. Water which is preſerved, or, in other words, kept in veſſels. Water of this deſcription is property, becauſe of its detention; and

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* Arab. *Shirbú*, a particular right to water, explained in the courſe of this book.

the right of others no longer extends to it;—in the ſame manner as holds with reſpect to game, after being taken by any perſon. Nevertheleſs, it is doubtful whether this water may not alſo be participated, becauſe of the tradition before quoted. Hence, if a perſon, in a time of ſcarcity, ſteal a quantity of water equivalent to the amount which conſtitutes theft, he is not liable to amputation.

unleſs there be other water at a little diſtance.

If a perſon be poſſeſſed of a well, fountain, or rivulet, he may prevent any one from drinking the water of them, or encroaching on his property, provided there be other water at a little diſtance, and which is not the particular property of any one. If, however, this be not the caſe, the proprietor muſt then either bring him water to drink, or permit him to take it himſelf, on condition that he deſtroy not the banks. What is here advanced is reported from *Tahávee.*—Some have ſaid that this is approved, in caſe the poſſeſſor of the well have dug it himſelf in land which is his own property: but that, if he ſhould have dug it in waſte lands, he is not, in that caſe, on any account permitted to prohibit others from entering on his premiſes to drink water; for the waſte lands are a common right; and as the well was dug towards the promoting of a common right, namely, tithe and tribute, it follows that the digging of it is not deſtructive of the liberty of drinking. If, therefore, the proprietor refuſe the other permiſſion to drink, and that other be apprehenſive either of the death of himſelf or his horſe from an exceſs of thirſt, he may then lawfully oppoſe the proprietor with weapons, as he has already aimed at his deſtruction in withholding his right, namely, the water; for the water of a well is common, and is not property.—It is otherwiſe with reſpect to water kept in veſſels; for a perſon in want of it where it is ſo kept, is only permitted to contend with the poſſeſſor of it *without* weapons. The ſame law obtains in the caſe of a perſon oppreſſed with hunger. Many have ſaid that in the caſe of a well it is not lawful to uſe weapons; but that it is allowable to contend with a ſtick; for the poſſeſſor is guilty of an offence in refuſing the water; and the application of a ſtick is a ſubſtitute for correction.

Water may alſo be carried away for the purpoſe of ablution,

or for watering trees or parterres.

It is lawful for men to carry away water from a rivulet to perform their ablutions, or to waſh their garments.—This is approved; becauſe, to deſire men to purify themſelves, or to waſh their garments with ſuch water, *without carrying it away*, (as mentioned by ſome,) would be attended with much inconvenience.—If, alſo, a perſon be inclined to water the trees or ſmall parterre before his houſe, he may lawfully carry away water for that purpoſe from the rivulet of another; for the law allows great liberty in the caſe of water, and conſiders the refuſal of it as truly opprobrious.—A perſon is not, however, allowed to carry away water either from the rivulet, well, or aqueduct of another, for the uſe of his orchard or fields, unleſs he be expreſsly permitted ſo to do; and the proprietor may prohibit him from it; becauſe when water is poſſeſſed in joint property, none but the proprietors have any right to the uſe of it, as otherwiſe their right would be defeated.—Still, however, the proprietor of the river may, if he chooſe, either give or lend the water of it to another, becauſe it is his property, and becauſe the gift of ſuch is cuſtomary; in the ſame manner as holds with reſpect to water preſerved in veſſels.

## SECT. II.

### *Of digging or clearing* Rivers*.

Rivers are of three kinds.—I. Such as are not the property of any; and of which the waters have not been divided, like the *Tigris*, *Euphrates*, &c.—II. Such as, being appropriated and divided, are at the ſame time public rivers, in which boats ſail.—III. Rivers that are held in property, and divided; and are alſo private, in which no boats ſail.—In the firſt kind of rivers, if the river fill up ſo as to require digging, the care thereof devolves upon the chief †, who is to defray the charges of it from the public treaſury; for as the work is performed for the advantage of the *Muſſulman* community, the expence attending it muſt be defrayed from the *property* of the community:—thoſe expences muſt, however, be diſburſed from the funds of *tribute* and *capitation-tax*, and not from thoſe of *tithe* and *alms*; for the latter are appropriated ſolely to the uſe of the poor, whereas the former are intended as a proviſion to anſwer contingencies.—If there be not any money in the public treaſury, the chief is in that caſe at liberty, with a view to promote the public utility, to compel the people to repair the damage in queſtion, as it is preſumed they would not of themſelves apply to the work,—whence it was that *Omar Farook* ſaid to the people, "*Were I to leave you to your own direction, without ever* "*uſing compulſion, verily, matters would come to ſuch a paſs that you* "*would even ſell your children.*"—None, however, muſt be compelled

*Rivers* are of three deſcriptions.

Great public rivers muſt be cleared and repaired at the expence of the public treaſury;

or by a general contribution of labour;

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* Arab. *Nihr.*—It is a term of very general application, ſignifying not only *rivers* properly ſo called, but alſo *canals*, or any other ſpecies of aqueduct conſtructed by art.

Arab. *Wâlee*; meaning, generally, the governor of a province or diſtrict.

pelled but ſuch as are able to work; and ſuch as are not able to work, and are rich, muſt pay a certain ſum, according to their particular ſtation and ability.—With reſpect to the ſecond kind of river, it muſt be cleared, when requiſite, at the expence of the proprietors, without any ſupply from the public treaſury; for the right of the river particularly belongs to them, as does alſo the uſe of it.—If, therefore, any one of them ſhould refuſe to aſſiſt in digging, the chief may compel him, to the end that the others may not ſuffer any injury by his refuſal.

and *appropriated* rivers, at the expence of the proprietors.

Objection.—It would appear that, in being thus forced to work, the refuſer ſuffers an injury.

Reply.—Such injury is particular, and is not without its uſe, for in recompence thereof the party obtains his ſhare of the water; it is not, therefore, to be put in competition with the common injury that would otherwiſe be ſuffered by the reſt.

—If, alſo, ſome of the proprietors of the river be deſirous of ſtrengthening the banks, from an apprehenſion that they might give way, and it be probable that bad conſequences may enſue from their decay, (ſuch as inundating the neighbouring country, and breaking up the roads,) the chief may in that caſe uſe compulſion with any of them who refuſe to aſſiſt in the undertaking. He muſt not, however, uſe force where the decay of the banks cannot produce any bad conſequence; for the fall of the banks is an event merely *probable*. It is otherwiſe with reſpect to clearing a river in a caſe of neceſſity; for that is a matter of certainty,—whence it is that compulſion may be uſed to effect it.—With reſpect to the third kind of rivers, they are particularly appropriated, and therefore the digging of them is entirely the duty of the proprietors.—Some have alleged that the magiſtrate may employ force with any who refuſe to dig; in the ſame manner as in the caſe of the ſecond kind of rivulets. Others, again, have maintained that the magiſtrate has not a power of this kind; ſince both of the injuries, namely, that of the partner on whom compulſion is uſed, and alſo that which the other partners ſuſtain in conſequence of his refuſal, are private; and the injury to the other partners may be remedied by their taking from the one who refuſes to work a part of the expence incurred in digging the rivulet, proportionately to his ſhare; (provided, however, that the work be executed at the inſtance of the magiſtrate.)—It is otherwiſe with reſpect to the *ſecond* kind of rivers, as there one of the injuries is *public.*

Objection.—Here likewiſe is a conjunction of two injuries; and as one of theſe (namely, that ſuſtained by thoſe who have a right to drink the water) is public, it would follow that, to prevent this public injury, compulſion may be uſed in the caſe of private rivers likewiſe.

Reply.—No compulſion is uſed in digging towards obtaining water to drink:—thus if the whole ſhould refuſe to dig, the magiſtrate cannot employ force *.

Rules with reſpect to drains.

In digging a watercourſe, the expence incurred in the upper part is equally defrayed by the whole of the partners: but when the work is carried beyond the land of any one of them, he is then, according to *Haneefa*, exempt from all further charge. The two diſciples maintain that the expences of digging from the head to the end of the watercourſe is jointly defrayed by the ſeveral partners, according to the extent of their ſhares; becauſe the partner poſſeſſing the higher ſhare has likewiſe a right in the lower ones, they being needful to him, in receiving the diſcharge, from his part, of the ſuperfluous water. *Haneefa*, in ſupport of his opinion, argues that the end of digging the watercourſe being to obtain water for the purpoſe of cultivation, the object of the higher ſharer is conſequently obtained when his part is finiſhed; and he is not, therefore, under any obligation after that to aſſiſt in proſecuting the work ſolely for the benefit of others.—With reſpect, moreover, to what the two diſciples urge, it may be replied that, although the higher partner do indeed ſtand in need of the lower ſhares, for the paſſing away of the ſuperfluous water from his ſhare, yet he is not, on that account, obliged to dig theſe lower ſhares;—in the ſame manner as where a perſon has a right of paſſing the water from his houſe upon the terrace of another; in which caſe he is not under any obligation to unite in building or repairing ſuch terrace.—Beſides, the higher partner may at any time prevent the water from overflowing his land, by occaſionally damming up the ſource or ſpring, thereby preventing the flow of any ſuperfluity of water into his ſhare.

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* When water is wanted, towards moiſtening lands for cultivation, the magiſtrate may then employ force in cauſing a rivulet to be dug; but not where the water is wanted only to drink.

When, in digging a watercourſe common to ſeveral partners, the work is carried beyond the ſhare of one of them, who is thus exempted from any further charge, ſome have alleged that he may then immediately open the ſpring-head, or inlet, in order to obtain water for cultivation, as the watercourſe, with reſpect of him, is wholly dug. Others have ſaid that he cannot do ſo until the ſhares of the other partners be likewiſe completed; in order to prevent any preference among them.

Such perſons as have only a right to *drink* the water, are not ſubject to pay any part of the charges of digging, as thoſe are numberleſs, and are, moreover, ſubordinate to the actual ſharers.

## SECT. III.

### *Of Claims of* SHIRB*; *and of Diſputes and particular Privileges with reſpect to it.*

A ri
water may
exiſt i

A CLAIM of *Shirb*, or right to water, is valid independant of any property in the ground, upon a favourable conſtruction of the law; for a perſon may become endowed with it, excluſive of the ground, either by inheritance or bequeſt; and it ſometimes happens that when a perſon ſells his lands he reſerves to himſelf the right of *Shirb*. Beſides, *Shirb* being a deſirable object, and alſo capable of yielding advantage, the claim to it is therefore valid.

No perſon
can alter or
obſtruct the

through his
ground.

IF a perſon be poſſeſſed of a rivulet running through lands which are the property of another, and the proprietor of theſe lands, being deſirous that it ſhould not run through them, attempt to prevent it, on the plea of its being his property, he muſt not be permitted to do ſo, but the rivulet muſt be ſuffered to flow in its uſual channel;—for, as the rivulet is in the poſſeſſion of the perſon who has the property of it, becauſe of his water running in the bed of it, his word, in caſe of a litigation, is therefore to be credited in preference to that of the other;—whereas, if the rivulet were not in his poſſeſſion, (as if it ſhould contain no water,) in that caſe the word of the proprietor of the lands would be credited;—unleſs the other could prove by witneſſes that the rivulet is his property, or that he formerly conveyed water through it towards his own grounds for the purpoſe of watering them,—when the *Kâzee* muſt decree it to him, as he thus ſubſtantiates his claim.—(Analogous to this is a contention concerning the property of a river-head, or a water drain, a ſpout, or a road through the court of another.)

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* This term, which is purely technical, the tranſlator, for the convenience of the reader, has rendered, in general, *a right to water*.

In caſe of diſputes, a diſtribution of the right to water muſt be made.

If a rivulet be jointly held by ſeveral perſons, and they diſpute concerning their particular proportions of right to water, a diſtribution muſt be made according to the extent of land which they ſeverally poſſeſs;—for as the object of right to water is to moiſten their lands, it is conſequently fit that each receive in proportion to his territory.—It is otherwiſe in the caſe of a *road*; for the object in that being to paſs and repaſs, the ſmallneſs or largeneſs of the houſe is of no weight in the diviſion;—that is to ſay, if the partners in a road diſpute concerning their ſhares, it is decreed that they ſhall hold it equally, and that no diſtinction ſhall be made from the difference of their houſes.

A rivulet muſt not be dammed up for the convenience of one partner, without the conſent of the others.

If it happen that the perſon who poſſeſſes the higheſt part of a rivulet be not able, without ſtopping the current, to enjoy his right to water in a ſatisfactory manner, (for this reaſon, that his lands, being high, precipitate the water from them with great velocity,) ſtill he muſt not be permitted to dam the rivulet, as he would thereby deſtroy the right of the others: he muſt, therefore, take his ſhare without ſtopping the current. If, however, the others aſſent to his ſtopping the current that he may the better water his land, or enter into an agreement that each ſhall ſtop it in his turn, it is lawful, as being their right. But if it be poſſible to effect the ſtoppage with a board, they muſt not uſe clay, or any kind of plaiſter, without the conſent of the whole, as an injury would be thereby occaſioned to the other ſharers.

It is not permitted to any of the ſharers to dig another rivulet leading from the common one, or to erect a water mill upon it;—becauſe, in the former inſtance, the bank of a common rivulet muſt neceſſarily be broken; and in the latter, an erection is made of a building upon a partnerſhip concern;—unleſs, however, the mill be ſtationed on the builder's land, and be not injurious, either to the ground, by breaking down the banks, or to the water, by diverting it into another channel;—in which caſe it is lawful, as being the exerciſe of a power derived from property, and from which there reſults not any injury to others.—(The erecting of a machine for raiſing water by camels, or oxen, is conſidered in the ſame light as the erecting of a mill.)—It is likewiſe unlawful for any of the ſharers either to erect a ſmall bridge which may be occaſionally withdrawn, or a large one of ſtone or bricks which is durable and fixed.—In ſhort, a private rivulet is conſidered in the ſame light as a private road, in which ſeveral participate, but in which none have any particular privileges.—It is otherwiſe where a perſon poſſeſſes a *ſmall* private rivulet brought out from a large private one jointly held by ſeveral; for in that caſe, if the proprietor of the little rivulet chooſe he may erect upon it a large ſolid bridge; or, if there was previouſly a bridge over it, he may if he pleaſe pull it down, (provided a greater quantity of water than formerly do not, by that means, flow into his rivulet,) for under theſe circumſtances the demolition of the bridge is lawful, being in virtue a power derived from his own property, which occaſions no detriment to others. He muſt not, however, extend the inlet of the ſmaller rivulet, as he would thereby deſtroy the banks of the large one, and likewiſe draw a greater quantity of water into his own than is his due.—Neither muſt he be ſuffered to enlarge the ſluice through which he receives his ſhare of water, where the diſtribution is made in that manner,—that is, where boards with holes are fixed on the bank of the river contiguous to the lands of each partner, that he may receive, as his ſhare, whatever

One partner trench erect a mill upon it without

a water engine or bridge.

ever quantity of water iſſues through his board.—But any of them who chuſes may either heighten or lower his particular board, as the equality of the diviſion depends upon the largeneſs or ſmallneſs of the holes, and not upon the height or lowneſs of them, for an alteration in that reſpect occaſions no difference in the diſtribution.

One partner cannot alter the mode of partition without the other's conſent;

If, where the diſtribution is made by ſluices, in the manner above deſcribed, one of the partners chooſe that the partition be made by the meaſure of time, he is not at liberty ſo to adjuſt it, unleſs with the concurrence of the others; for whatever is the eſtabliſhed mode muſt be continued; as the right of every one is by that means more clearly diſtinguiſhed.

or increaſe the number of openings through which he receives his ſhare,

If each partner in an appropriated rivulet have a ſpecific number of holes or ſluices allotted to him, it is not permitted to any of them to increaſe that number, notwithſtanding it may occaſion no injury to the others; for here exiſts a partnerſhip in particular property, and in which the right of each is particularly ſpecified.—It is otherwiſe in the caſe of large rivers, ſuch as the *Tigris* or the *Euphrates*; for as there any perſon is at liberty to dig a ſmall rivulet, and fill it from them, he is conſequently at liberty to increaſe the holes or ſluices through which the waters paſs from them.

or convey his ſhare into lands not entitled to receive it,

or through ſuch lands into thoſe that are entitled:

It is not lawful for any of the partners in a river to convey his ſhare of water into ſuch of his lands as are not entitled to receive water from that river; for this circumſtance might, in proceſs of time, furniſh an argument of his having a right to water theſe lands from that river.—Neither is it lawful for a partner to convey his ſhare of water through ſuch of his lands as are not entitled to it, into others that are; for, in this caſe, it is probable he would receive a greater quantity of water than his due, as part would be abſorbed by the lands through which they firſt paſſed. (This is analogous to the caſe of a joint road, where one of the partners wiſhes to open a road to the inhabitants of a houſe, in the ſame range, whoſe road lies through another way, by permitting them to paſs through his houſe in their way to their own.)

neither can he ſhut up any of the water-vents,

or adopt a partition by

If two perſons poſſeſs a rivulet jointly, and receive their ſhares by water iſſuing through ſluices, and the one whoſe ſhare lies neareſt to the ſource be inclined to ſtop ſeveral of the ſluices allotted to him, to prevent the iſſue of a ſuperfluity of water into his lands, he muſt not be allowed ſo to do, as he might thereby ſubject the lands of the other ſharer to be overflowed.—Neither is he at liberty to change the mode of participation, by taking the uſe of the whole, in rotation, inſtead of each receiving a moiety of the whole quantity; for as the diviſion has already been ſettled by the mode of vents or ſluices, he cannot afterwards require any other mode,—unleſs the other aſſent, in which caſe he may do ſo;—it ſtill, however, remaining at the option of this partner (or of his heir, after his deceaſe) to annul this, and revert to the former mode;—becauſe the eſtabliſhment of a diviſion, by giving the whole to each in rotation, in a caſe where each had formerly held a ſeparate ſhare, is, in fact, *lending* a right to water, (as an exchange of *Shirb* for *Shirb* is null;) and a right to water is inheritable, or the *uſe* of it may lawfully be left in legacy; but it can neither be ſold nor beſtowed in gift, nor left in legacy to ſell, give away, or beſtow in alms, theſe ſeveral deeds being unlawful on account of the uncertainty to which they are liable, either from ignorance or deceit, with regard to the quantity of water,—or becauſe *Shirb* is not, in itſelf, a ſubſtantial property, but rather a privilege or immunity, inſomuch that if a perſon water his lands from the *Shirb* of another, he is not liable to make compenſation for it;—and theſe ſeveral deeds being void, a legacy for any of theſe purpoſes is alſo void.

A right to water cannot be conſigned as a dower;

or given as a conſideration for *Khoola*,—

A RIGHT to water is incapable of being aſſigned as a ſpecific dower in a contract of marriage; wherefore if ſuch be mentioned in a marriage contract, a *Mihr-Miſl*, or *proper* dower, is due. In the ſame manner, alſo, it cannot be given as a conſideration for *Khoola*;—whence, if a wife bargain for her divorce, in conſideration of her making over ſuch right, the huſband may reſtore it to her, and, in lieu of it, take from her the dower he had aſſigned her on their marriage. The ground on which the law in theſe caſes proceeds is, that a right to water is a matter the extent of which cannot be aſcertained with any preciſion.

or in compoſition for a

A RIGHT to water is incapable of being given in compoſition for a claim; for as it cannot, by means of any deed whatever, be rendered property, a compoſition in conſideration of it is conſequently null.

to diſcharge the debts of a

this laſt inſtance.)

RIGHT to water, without ground, cannot be ſold after the death of any perſon to diſcharge his debts,—in the ſame manner as it cannot be ſold during his lifetime. What, then, ſhall the *Imâm* do, in this caſe, towards ſettling the debt of the deceaſed?—This queſtion has given riſe to a diverſity of opinions; but the moſt adviſeable method of proceeding, in ſuch an inſtance, is to join the right to the lands of another perſon not poſſeſſing ſuch right, and then, with his conſent, to diſpoſe of both;—when, computing how much the value of the lands has been increaſed by the addition of the right, he may apply the difference towards paying off the debts of the deceaſed. If he be not able to procure land in this manner, he may buy a piece of land, payable from the effects of the deceaſed, and, having joined it to the right, ſell them together; when, with the price ſo obtained, he muſt firſt diſcharge the purchaſe-money of the land, and then apply the reſidue to diſcharging the debts of the deceaſed.

Any accident from the uſe

If a perſon, having moiſtened his lands, or filled them with water, ſhould by that means overflow the lands of his neighbour, he is not, in ſuch caſe, liable to make a compenſation, as he was not guilty of any tranſgreſſion.

# HEDAYA.

## BOOK XLVI.

## Of PROHIBITED LIQUORS.

There are

I. *Khamr*, (the *crude* juice of the [illegible])

THERE are four prohibited liquors,—the firſt of which is termed *Khamr*[*], meaning (according to the expoſition of *Haneefa*) the crude juice of the grape, which, being fermented, becomes ſpirituous,—firſt gathering foam and ſettling, and then poſſeſſing an inebriating quality. According to the two diſciples, the juice becomes *Khamr* upon its fermenting, and being ſpirituous without the condition of its gathering foam;—for whenever the juice of grapes becomes ſpirituous, the appellation of *Khamr*, and the characteriſtic of it, namely, *illegality*, are both eſtabliſhed.—The argument adduced by *Haneefa* is, that fermentation is the commencement of the proceſs by which liquor becomes ſpirituous, and which is compleated when it foams and ſettles, as by that means the dregs are ſeparated from the finer particles;—and the ordinances of the LAW regarding *Khamr*, (which are deciſive,) ſuch as puniſhment for drinking it, the holding him an infidel who ſhall deem it lawful, and the prohibition againſt ſelling it,—have all a reference to the *completion*. Some of the learned allege that it is declared unlawful to drink after having become ſpirituous, purely from motives of caution.—Others, again, maintain that the term *Khamr* is applicable to whatever is of an inebriating quality; becauſe it is mentioned in the traditions, that "*whatever inebriates is* KHAMR;"—and (in another tradition) "KHAMR *is produced from two trees, namely, the* VINE *and the* "DATE." The term *Khamr*, moreover, is derived from *Mokhâmirâ*, ſignifying, *ſtupefaction*, or *deprivation of ſenſe*, which is a conſequence of drinking *any* inebriating liquor.—In reply to this, however, *Haneefa* argues that the term *Khamr*, according to the concurrent opinion of all lexicographers, is uſed only in the ſenſe above mentioned, whence it is that to liquors of other deſcriptions other terms are applied, ſuch as *Nabeez*, *Tabeekh*, and *Moſulis* *. Another argument is that the illegality of *Khamr* is *indubitable*,—whence, if every inebriating liquor were *Khamr*, all ſuch would of courſe be likewiſe indubitably illegal,—whereas this is not the caſe, for there is a doubt regarding them. In reply, moreover, to the arguments of *ſome* of the learned as above adduced, it is to be remarked that the firſt recited tradition is not perfectly authentic, *Yehya Ibn Mayeen* having diſputed it;—and with reſpect to the *ſecond* quoted tradition, the intention of it was merely to explain the LAW, or, in other words, to ſhew that all liquors extracted from either of the two trees mentioned, being of an inebriating quality, are unlawful as well as *Khamr*.

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[*] The tranſlator has, in the courſe of the work, rendered every inebriating drink under the general term *wine*, which comprehends all deſcriptions of prohibited liquors.—In this book, however, he retains the original terms for the ſake of diſtinction.

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* Theſe are different kinds of liquor, extracted from dates, which are more particularly deſcribed a little farther on.

which is unlawful in *any* quantity,

KHAMR is in itſelf unlawful, whether it be uſed in ſmall or great quantities, the illegality not depending on drinking it to ſuch a degree as to produce *intoxication*. Some of looſer principles reject the *abſolute* illegality of *Khamr*, alleging that its *effects* only are the cauſe of its illegality; becauſe the evil of it is, that it creates an inattention towards the worſhip of GOD; and as this evil is occaſioned only by *intoxication*, it follows that where this does not take place it is not unlawful.—This, however, is groſs infidelity, and in direct contradiction to the KORAN, GOD having there termed ſuch liquor *filth*, a thing which is unlawful in its own nature. Beſides, the prophet has decreed *Khamr* to be unlawful, according to various traditions; and all the doctors are unanimouſly of this opinion. It is to be obſerved, however, that although *Khamr* be unlawful, even in ſo ſmall a quantity as may not be ſufficient to intoxicate, yet the ſame law does not hold with reſpect to other things of an inebriating quality; for a little of them, if not ſufficient to intoxicate, is not forbidden. *Shafeï*, indeed, is of opinion that theſe are likewiſe unlawful, in any quantity.

is *filth* in an extreme,

KHAMR is filth in an extreme degree, in the ſame manner as urine; for the illegality of it is indiſputably proved, as has been already ſhewn.

WHOSOEVER maintains *Khamr* to be lawful is an infidel *, for he thereby rejects inconteſtable proof.

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* And conſequently becomes expoſed to the penalties of apoſtacy.

**Khamr** is not a valuable commodity with reſpect to *Muſſulmans.* If, therefore, it be *deſtroyed* or *uſurped* by any perſon, there is no reſponſibility. The ſale of it is moreover unlawful; for God, in terming it *filth*, manifeſted a deteſtation of it; whereas, if it had been a commodity of value, ſome reſpect would have been ſhewn to it.—Beſides, it is recorded in the traditions, that "*he who prohibited the* "*drinking of it, did likewiſe prohibit both the ſale of it and the uſe or* "*enjoyment of the price of it.*"

and cannot
conſtitute
pr
a

If a *Muſſulman* be indebted to another, and wiſh to diſcharge the debt with the price of *Khamr*, in that caſe both the payment and receipt is unlawful, becauſe ſuch price is produced from an illicit ſale, and is conſidered either as an uſurpation or a truſt in the *Muſſul* hands, according to the different opinions of the doctors on this ſubject; in the ſame manner as in the caſe of the ſale of carrion. If, on the contrary, the debtor be a *Zimmee*, it is lawful for his *Muſſulman* creditor to receive ſuch payment; as the ſale of *Khamr* is legal amongſt *Zimmees*.

nor be employed in the
diſcharge of
his debts,

It is unlawful to derive any uſe from *Khamr*, either as a medicine, or in any other manner; becauſe the uſe of *filth* is forbidden; and alſo, becauſe abſtinence from it is enjoined; and this injunction could not be obſerved in caſe of its uſe being allowed.

or uſed by
him,

Whoever drinks *Khamr* incurs puniſhment, although he be not intoxicated; for it is ſaid, in the traditions, "*Let him who drinks* "Khamr *be whipped;—and if he drink it again, let him be again in the* "*ſame manner puniſhed.*" The whole of the companions are agreed upon this point; and the number of ſtripes preſcribed is eighty, as has already been ſhewn in treating of *puniſhments*.

drinking of
which, in
d
ment,

If a perſon boil *Khamr* until two thirds of it evaporate, it is not thereby rendered lawful. If, however, a perſon drink of it after

(unleſs it be
*boiled.*)

ſuch proceſs, he is not liable to puniſhment, unleſs he be intoxicated.

but it may be converted into vinegar.

It is lawful to make vinegar of *Khamr*. *Shafeï*, however, holds a different opinion.

II. *Bàzik*, (the *boiled* of the boiled away to one half) *Moniſſaf*.

Thus much with reſpect to *Khamr*, the firſt in order of prohibited liquors.—The ſecond ſpecies of prohibited liquor, is the juice of grapes boiled until a quantity leſs than two thirds evaporate. This is denominated *Bàzik*. It is alſo termed *Moniſſaf*; but that is only where exactly one half of it evaporates in boiling. This kind of liquor is unlawful, according to all our doctors:—according to the two diſciples, when it only ferments and becomes ſpirituous;—and according to *Haneefa*, when it foams and ſettles. *Oozràï* has ſaid that *Moniſſaf* is lawful; (and ſeveral of the tribe of *Mutazali** have ſeconded this opinion;) becauſe it is a good liquor, or, in other words, is pleaſing to the palate; and alſo, becauſe it is not *Khamr*. The argument of our doctors is, that as *Moniſſaf* is pure, and equally delicious with *Khamr*, a number of the idle and diſſolute are conſequently tempted to drink it; and it is therefore prohibited, with a view to prevent that diſſipation which it is found to occaſion.

(an infuſion of dates.)

The third ſpecies of unlawful liquor is termed *Sikkir*; and is made by ſteeping freſh dates in water until they take effect in ſweetening it; when it is both *unlawful* and *abominable* to drink of it. *Shareek-Ibn-Abdoola* alleges that it is lawful, as God, ſpeaking of his bounty in the Koran, ſays "Ye enjoy *Sikker* from the grape and the "date;" whence we may infer that it is allowable, as *bounty* cannot apply to any thing unlawful. The argument of our doctors is the concurrent opinion of all the companions upon this point; and with

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* A particular heretical ſect of the *Muſſulmans*. (See *Sales'* Preliminary Diſcourſe, . 8.)

eſpect

reſpeƈt to the text above cited, it has a reference to a *particular period*, having been revealed in the infancy of the religion of *Iſlam*, when all ſorts of ſpirituous liquors were lawful.

The fourth ſpecies of prohibited liquors is *Nookoo-Zabeeb* *, that is, water in which raiſins are ſteeped until it become ſweet, and is affeƈted in its ſubſtance. This kind is, however, lawful when merely it poſſeſſes a *ſweet quality*;—and is prohibited only when it ferments and becomes ſpirituous. *Oozraï* is of a different opinion regarding this liquor likewiſe.

infuſion of raiſins.)

It is to be obſerved that the illegality of theſe liquors, namely, *Bàzik*, *Moniſſaf*, and the *Nookoo* of dates and raiſins, is inferior to that of *Khamr*. If, therefore, any perſon hold theſe lawful, ſtill he is not deemed an infidel. It is otherwiſe in the caſe of *Khamr*; for, with reſpeƈt to the liquors here mentioned, the illegality is a mere matter of opinion; whereas, with regard to *Khamr*, the illegality is undiſputed. Puniſhment, moreover, is not infliƈted for drinking theſe liquors, except in a quantity ſufficient to produce intoxication; whereas the drinking of one drop only of *Khamr* induces puniſhment. The *filth* of theſe liquors, likewiſe, according to one tradition, is of a *ſlight* degree, and according to another, of an *extreme* degree; *filth* of *Khamr* is of an *extreme* degree, according to *every* tradition. The ſale of the liquors in queſtion is lawful, according to *Haneefa*, and a compenſation is due from the deſtroyer of them. The two diſciples, on the contrary, hold that the ſale of them is unlawful, and that no reparation is due from the deſtroyer of them; in the ſame manner as in the caſe of *Khamr*.—It is unlawful to derive any kind of uſe from the above mentioned liquors, as they are prohibited. It is related that *Aboo Yooſaf* holds the ſale of any of the aforeſaid liquors, excepting

The three laſt are not ſo illegal as *Khamr*.—They may be held legal, without incurring a change of infidelity, and may be drank (ſo as not to cate) without puniſhment.

They may alſo be and are jeƈt of reſponſibility;

but they muſt not be *uſed*.

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* *Nookoo* ſignifies water in which any thing is ſteeped; and *Zabeeb* means r

*Khamr*, to be lawful,—if more than one half, and leſs than two thirds, have evaporated in the boiling.

MOHAMMED, in the *Jama Sagheer*, remarks that every ſort of liquor excepting thoſe above mentioned is lawful. This opinion, the learned ſay, is recorded only in the *Jama Sagheer*, and is not to be found in any other book. It, however, affords an argument that any kind of ſtrong liquor extracted from wheat, barley, honey, or millet, is lawful in the opinion of *Haneefa*, if not drank ſo as to occaſion intoxication; and he, in fact, maintains that puniſhment is not inflicted even in the caſe of intoxication. If, therefore, a perſon intoxicated with theſe liquors ſhould divorce his wife, it is void, in the ſame manner as divorce pronounced by a perſon in his ſleep, or by one whoſe faculties are impaired from the uſe of opium, or from having drank the milk of a mare in a medical compoſition. It is elſewhere related, as an opinion of *Mohammed*, that every ſort of ſtrong drink, excepting thoſe above ſpecified, is prohibited;—that if a perſon drink them to intoxication he is to be puniſhed;—and that a divorce pronounced by him when ſo intoxicated is valid;—in the ſame manner as holds in the caſe of liquors; and decrees paſs according to this opinion. He has alſo ſaid, in the *Jama Sagheer*, that *Aboo Yooſaf* had firſt declared every ſort of wine to be unlawful which fermented and became ſpirituous, and afterwards remained ten days without ſpoiling: but that he afterwards adopted the opinion of *Haneefa*. In other words, he firſt, according to the adjudication of *Mohammed*, deemed all inebriating liquors unlawful; but afterwards adopted the opinion of *Haneefa*. *Aboo Yooſaf* was ſingular in making it a condition that the liquor ſhould remain ten days without being ſpoiled. He, however, afterwards receded from this opinion, and gave into that of *Haneefa* and *Mohammed* on this point. In the *Abridgement* [of *Kadooree*] it is ſaid, that the ſteeping of raiſins or dried dates, when boiled a little, even ſo as to become ſpirituous, may lawfully be drank in ſuch a quantity as not to inebriate, provided it be done without wantonneſs or joy.—This is according only to the two *Elders*; for *Mohammed* and *Shafeï* deem it unlawful.

*Khoolteen* (a mixture of the of raiſins) may be drank.

There is no impropriety in drinking *Khoolteen*; that is, water in which dates have been ſteeped, mixed with that of raiſins, and boiled together until they ferment and become ſpirituous. This is grounded on a circumſtance relative to *Ibn Zeeyâd*, which is thus related by himſelf:—"*Abdoolla*, the ſon of *Omar*, having given me ſome *Sherbet* to drink, I became intoxicated to ſuch a degree that I knew not my own houſe. I went to him next morning, and having informed him of the circumſtance, he acquainted me that he had given me nothing but a drink compoſed of dates and raiſins."—Now this was certainly *Khoolteen*, which had undergone the operation of boiling; becauſe it is elſewhere related by *Omar* that it is unlawful in its crude ſtate.

duced by means of *honey* or *grain* are lawful;

Liquor produced by means of honey, wheat, barley, or mille[illegible] is lawful, according to *Haneefa* and *Aboo Yoosaf*, although it be not boiled,—provided, however, that it be not drank in a wanton or joyful manner. The argument they adduce is the ſaying of the prophet "Khamr *is the product of theſe two trees*;" (meaning the *vine* and the *date*;)—that is to ſay, he confined the prohibition to theſe two trees, as his intention was to explain the law.—It is to be obſerved that ſeveral of the learned have made the boiling of theſe liquors a requiſite towards their legality. Others, on the contrary, hold it to be no way neceſſary; (and ſuch is the opinion recorded in the *Mabſoot*;) becauſe theſe liquors are not of ſuch a nature that a little induces a wiſh for more, whether they be boiled or crude. It has likewiſe been diſputed whether a perſon who gets drunk with any of theſe liquors is to be puniſhed. Some have ſaid that he is not. The learned in the law, however, have determined otherwiſe; for it is related by *Mohammed* that puniſhment is to be inflicted on whoever is intoxicated with any of the aforeſaid ſtrong liquors; for this reaſon,

but any perſon drinking them to intoxication in [illegible] that in the preſent age they are as much ſought for by the diſſolute as other liquors were formerly; nay even more ſo.—The ſame law holds with regard to ſtrong drinks extracted from milk. Many have ſaid that any drink made from the milk of a mare is unlawful, in the opinion of *Haneefa*, becauſe it is derived from the fleſh, which (according to him) is unlawful. Lawyers, however, remark it as the better opinion that the milk is not unlawful according to *Haneefa*; for although he have pronounced the fleſh to be abominable, yet the reaſon is either becauſe, if it were otherwiſe, the means of conqueſt would thereby be deſtroyed; or becauſe the horſe is a noble animal; neither of which reaſons hold with regard to the *milk*.

*Moſillis* (grape juice boiled down to a third) is lawful.

If the juice of grapes be boiled until two thirds of it evaporate, (being then termed *Moſillis*,) it becomes lawful, according to the two [illegible], notwithſtanding it be ſpirituous. *Mohammed*, *Shafeï*, and *[illegible]lik*, ſay otherwiſe. (This difference of opinion, however, exiſts on the ſuppoſition that it is uſed with a view to ſtrengthen the conſtitution; for if it be drank from pleaſure or joy they are unanimous in judging it unlawful.) *Mohammed*, *Shafeï*, and *Málik*, in ſupport of their opinion, have cited a ſaying of the prophet, "*Every* "*inebriating drink is* Khamr; *and whatever in exceſs produces intoxi-* "*cation is prohibited, even in moderation*;" and in another place, "*Any drink of which one cupful occaſions intoxication, is unlawful in a* "*ſingle drop*."—Another argument is, that every inebriating liquor tends to ſtupify the ſenſes, and is conſequently prohibited either in a ſmall or large quantity, in the ſame manner as *Khamr*. The two *Elders*, in ſupport of their opinion, have quoted the ſaying of the prophet, "Khamr *is unlawful in its very nature*;" and in another place, "*Little or much of it is alike unlawful*; *and inebriation from* "*every other ſtrong drink* (that is to ſay, every kind beſides *Khamr*) "*is forbidden*." Now ſince the prophet has ſpecified *intoxication* as a condition with reſpect to other drinks than *Khamr*, we may conclude that on that circumſtance only their illegality depends. Beſides, a ſtupefaction of the ſenſes takes place only when liquors are uſed in ſuch exceſs as to inebriate, which is allowed to be illegal. A little, therefore, of any ſtrong drink other than *Khamr* is never illegal, except when, on account of its fineneſs or purity, a little of it invites to more,—in which caſe the law regards every quantity of it in the ſame light. This, however, is not the caſe with *Moſillis*, a *little* of which, becauſe of its thickneſs, does not induce a wiſh for more; and which, in its ſubſtance, is food,—wherefore when uſed in a moderate quantity it retains its original legality *.

If a little water be poured into *Moſillis* to render it fine, and it be afterwards boiled for a ſhort time, it is ſtill *Moſillis*, the addition of water tending only to weaken it.—It is otherwiſe where water is mixed with crude juice, and this mixture is then boiled until two thirds of it evaporate; for here, either the water purely evaporates altogether, or it evaporates jointly with the juice; and in either caſe it is plain that two thirds of the pure juice of the grapes or dates does not evaporate, which is requiſite to render it a legal drink.

Rule in the

If grapes be firſt boiled, and afterwards preſſed until their juice be extracted, in that caſe a very little more boiling is ſufficient to render the drinking of the liquor lawful, according to one tradition of *Haneefa*. According to another tradition it does not become lawful until two thirds of it evaporate in boiling; and this is the better opinion; becauſe the juice remaining within the film, and not being in any manner affected by the boiling, it is conſequently ſimilar to juice which is not boiled.

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* By *original* legality *Haneefa* alludes to an opinion he maintained in oppoſition to that every thing is *originally* lawful in its nature, being rendered otherwiſe only by the prohibition of the ſacred writings;—whereas *Málik* holds every thing to have been originally unlawful, until ſanctified by the Koran.

or grapes mixed with dates.

If freſh or dried grapes, being mixed with dates, be then boiled, two thirds of the mixture muſt evaporate before it becomes lawful; for although, with reſpect to dates, a *ſmall* boiling be often ſufficient, yet with reſpect to the juice of grapes two thirds are always required to have evaporated in boiling. The ſame rule alſo holds where the juice of grapes is mixed with the water in which dates have been ſteeped. If, however, dried grapes, being mixed with the water of dates, ſhould be boiled for a little, and afterwards ſome dates or dried grapes be thrown into it, in that caſe, provided the quantity thrown in be ſmall, and not ſo much as is generally uſed to make *Nabeez*, it is lawful. It is otherwiſe, indeed, if the quantity be not ſmall;—in the ſame manner as where a pot of the water of dates or raiſins is mixed with the boiled juice. Still, however, the perſon who drinks it is not ſubject to puniſhment, becauſe its illegality is adjudged merely on principles of *caution*; and endeavours muſt always be uſed to avoid the infliction of *puniſhment*.

Liquor, having once acquired a ſpirit, is not rendered lawful by boiling.

If *Khamr*, or any other ſpirituous liquor, be boiled until two thirds of it evaporate, ſtill it is not lawful; for the illegality of it, which was previouſly eſtabliſhed, is not removed by boiling.

Rule with reſpect to the uſe of *veſſels*.

There is no impropriety in ſqueezing juice into pots or veſſels of a green colour, or of which the interior part has been varniſhed with oil. The reaſon of this is, that formerly, in the infancy of the *Muſſulman* religion, it was cuſtomary to keep *Khamr* in ſuch veſſels; and, on this account, when *Khamr* was rendered illegal, the prophet prohibited the uſe of them likewiſe, that the greater caution might be obſerved. He afterwards, however, permitted the uſe of them, ſeeing that the veſſels of themſelves did not render any thing unlawful. If, therefore, *Khamr* have been kept in theſe veſſels, it is neceſſary they be waſhed before they are applied to uſe.

If a veſſel be old, it becomes clean by three waſhings: but if it be new it can never be cleanſed, in the opinion of *Mohammed*; for then the wine penetrates, and makes a deep impreſſion in it; contrary to the caſe of an old one. *Aboo Yooſaf* holds that it may be cleanſed by waſhing it thrice, and drying it after each waſhing.—Several have ſaid that, in the opinion of *Aboo Yooſaf*, the mode of cleanſing it is by filling it with water, and letting it remain for a ſhort time; and then emptying it and filling it again; and ſo repeating this proceſs until the water poured out be perfectly pure; when the veſſel is clean.

be made from

When *Khamr* is converted into vinegar, it is then lawful, whether it have been made ſo by throwing any thing into it, (ſuch as ſalt or vinegar,) or have become ſo of itſelf.

*

Vinegar made of *Khamr* is not abominable. *Shafei* maintains that it is abominable; and that all vinegar obtained from *Khamr* by means of ſome mixture is unlawful.—With reſpect, however, to ſuch as turn ſo from *Khamr* of itſelf, he has given two different opinions.

and
in which it i
ſo made becomes pure.

When *Khamr* is changed into vinegar, the veſſel in which it is contained becomes clean according to the quantity of the *Khamr*. With regard to that part of the veſſel that was empty, ſeveral have ſaid that it alſo becomes clean, as being dependant on the other: but others have ſaid that, as it is battered over with dried *Khamr*, it does not become clean until it be waſhed with vinegar, when it is immediately purified. In the ſame manner alſo, if *Khamr* be poured out of a veſſel, and the veſſel be then waſhed with vinegar, it becomes (as lawyers have ſaid) inſtantaneouſly

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of

It is abominable to drink the *dregs* of *Khamr*, or to uſe it in combing the hair, as ſome women do; for the dregs are not entirely void of the particles of *Khamr*, and it is unlawful to apply any unlawful thing to uſe;—whence the illegality of uſing it in healing a wound, or applying it to a ſore on the back of a quadruped.—It is alſo unlawful to adminiſter it to an infidel or an infant; and whoſoever does ſo is chargeable with the crime of it. In the ſame manner, it is unlawful to give it to a quadruped to drink.—Concerning this point, however, ſeveral have ſaid that although it be unlawful to carry *Khamr* to a quadruped, yet if the animal, being brought to it, ſhould drink of it, there is no impropriety;—in the ſame manner as in the caſe of a dog and carrion; that is to ſay, carrion muſt not be thrown to a dog; but if a dog be carried to where carrion is, he may, without any impropriety, be ſuffered to eat it.

It is allowable to mix the dregs of *Khamr* with vinegar. In this caſe, however, it is required, that the vinegar be carried to the place where the dregs are, and be there mixed, for otherwiſe it is unlawful.

A person who drinks the dregs of *Khamr* without being intoxicated is not liable to puniſhment. *Shafeï* is of a different opinion; for in this caſe ſeveral of the particles of *Khamr* muſt neceſſarily be drank likewiſe. Our doctors, on the contrary, argue that as the dregs of *Khamr* are diſagreeable to the palate, a little of it does not, by conſequence, beget an inclination for more; and thus, being like other ſtrong drinks, the drinking of a little, unleſs it be attended with intoxication, is not puniſhable.

*injection*
*hamr is*

An injection of *Khamr* into the *anus* or *penis* is unlaw[illegible] as being a benefit derived from an unlawful article. It is not, however,

ever, *puniſhable*, as puniſhment is inflicted only in the caſe of *drinking* it.

not [illegible]

If a perſon throw *Khamr* into ſoup, it is not then lawful for him to eat the ſoup, becauſe of its being rendered impure. Nevertheleſs, if he eat it he is not liable to puniſhment, for in this caſe the *Khamr* is as it were *boiled*.

and ſo likewiſe a mixture of it in viands.

If a perſon knead flour with *Khamr*, in that caſe it is unlawful to eat the bread or paſte ſo made, as many of the particles of the *Khamr* ſtill remain in it.

## SECTION.

### *Of boiling the Juice of Grapes.*

In boiling the juice of grapes there are three principles.—The firſt principle is, that whatever quantity may run over the pot from the agitation in boiling, or from the foaming of the juice, is not taken into account, but is conſidered as not having belonged to it; and the reſidue is to be boiled until two thirds of it evaporate, in order that the remaining third may be rendered lawful. To illuſtrate this:—ſuppoſe a perſon inclined to boil ten cups of juice; in that caſe, if one cup be loſt from its boiling over the pot, he muſt boil the remainder until ſix cups have evaporated and three remain in the pot, when it becomes lawful.

There are three ge principle be obſer upon this ſubject.

The ſecond principle is, that if water be firſt poured into the juice, and the whole be then boiled, and the water, on account of its ſubtlety, be ſoon waſted, it is requiſite that whatever remains after the evaporation [of the water] be boiled until two thirds of it be waſted. If, on the contrary, the water and juice evaporate together, it is in that caſe requiſite that the mixture be boiled until two thirds of the whole evaporate, that the remaining third may be rendered lawful; for here the third of the mixture of water and juice which remains becomes the ſame as if, a third of the pure juice having remained, water had then been poured into it. To exemplify this:—ſuppoſe a perſon ſhould mix ten cups of juice with twenty cups of water;—in that caſe, if the water purely evaporate, the mixture muſt be boiled until a ninth of it remain, which is equivalent to one third of the pure juice;—whereas, if the juice and water evaporate conjunctly, the whole muſt then be boiled until two thirds of it evaporate.

If juice be boiled with fire*, at one or ſeveral different times, before it be inebriating or prohibited, it is lawful. If, alſo, the juice, being taken from the fire, ſhould continue to boil until two thirds of it evaporate, it is lawful, as in this caſe the evaporation is the effect of the fire.

The third principle is, in boiling juice, after part of it has evaporated, and part has likewiſe been poured out,—to know how much more muſt evaporate, that the remaining part may be rendered lawful;—and, in order to this, the following rule muſt be obſerved.—The quantity which remains after part has been poured out muſt be multiplied by the third of the whole; and this ſum being divided by the quantity which remains after part of it only has evaporated, the quotient is the quantity that is lawful. Thus, if a perſon boil ten cups of juice, and after one cup had evaporated, three cups more ſhould be poured out; then three cups and one third (the third of the whole) being multiplied into ſix, the number which remains after the loſs of evaporation and pouring out amounts to twenty, and this ſum being divided by nine, there remains two cups and two ninths; the quantity which is lawful, when the reſt has evaporated.

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* The common method of making ſtrong drink, among the *Aſiatics*, is by fermenting the juice in the ſun.

# HEDAYA.

## BOOK XLVII.

## Of HUNTING.

### SECT. I.

### *Of catching Game with Animals of the* HUNTING TRIBE, *ſuch as* DOGS, HAWKS, *&c.*

It is lawful to hunt with all animals of the hunter

IT is lawful to hunt with a trained dog, a panther*, a hawk, a falcon, and in ſhort with every animal of the hunter tribe that is *trained.* It is related in the *Jama Sagheer* that game caught with a tribe that are duly *trained*.

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* *Yûz.*—It is an animal of the *leopard* or *lynx* ſpecies, hooded and trained to catching game, nearly on the ſame principle as the hawk.

*trained* animal of the hunter tribe, whether bird or beaſt, is lawful; but that, caught with any other animal it is not lawful, unleſs when taken alive, and ſlain by *Zabbah*. This doctrine is eſtabliſhed by a text of the KORAN, in which mention is made of trained dogs. The term *Kalb* [dog] comprehends, in its general acceptation, every carniverous animal, even to a tiger*. It is, however, related as an opinion of *Aboo Yooſaf*, that tigers and bears are excepted, as neither of them hunt for others,—the tiger becauſe of his ferocity, and the bear becauſe of his voraciouſneſs. Some of the *kite* tribe have likewiſe been excepted becauſe of their voraciouſneſs; and the hog has been excepted becauſe it is eſſential filth, and becauſe it is unlawful to derive any advantage from it. It is to be obſerved that it is a condition of the lawfulneſs of game that the animal which takes it be of the hunter tribe, and trained; and alſo that the maſter let ſlip† the animal in the name of GOD; for it is ſo related in a tradition of *Audee*, the ſon of *Hàtim*

Rules for aſcertaining whether a dog, &c. be duly trained.

THE ſign of a dog being trained is, his catching game three times without eating it; whereas the ſign of a hawk being trained is, merely, her returning to her maſter, and attending to his call. Theſe ſigns are adopted from *Abdoolla Ibn Abaſs*. The body of a hawk, moreover, is not capable of enduring blows; but as, on the contrary, the body of a dog has this capability, a dog is therefore to be beaten until he deſiſt from eating the game. Beſides, one ſign of being trained is, to deſiſt from that which cuſtom and habit have made agreeable; and as it is the cuſtom of a hawk to be wild and to fly from man, it follows that its paying attention to its maſter's call, and ſhewing no wildneſs, is a ſign of its being trained. With reſpect to a *dog*, on the contrary, he is attached to man; but his cuſtom is to tear and eat; and conſequently, when he preſerves game and does not eat it, it is a ſign of his being trained.—It is to be obſerved that the condition here recited, of a dog deſiſting, and not eating three times, is the doctrine of the two diſciples; (and there is alſo one tradition from *Haneefa* to the ſame effect;)—and the reaſon of it is that, in leſs than three times there is a probability of the dog's forbearance having proceeded from ſatiety or ſome ſuch cauſe; but that when he deſiſts from eating for three different times, it is a proof that ſuch forbearance has become a cuſtom; for this particular number of *three* is the eſtabliſhed ſtandard for experiments, and for the diſcovery of an evaſion,—in the ſame manner as it is uſed in determining the period of an option. It is alſo recorded to have been adopted in the ſtory of *Moſes* and *Khizzir*[*]; for *Khizzir*, upon the third inſtance, ſaid, "Now there is a ſeparation between "you and me." Another reaſon is that plurality is a ſign of knowledge; and as *three* is the ſmalleſt number of plurality[†], it has therefore been adopted as the ſtandard. In the opinion of *Haneefa*, however, as recorded in the *Mabſoot*, a training does not take place, ſo long as the hunter does not conceive the animal to be trained;—and he holds it improper to fix on the number *three*; becauſe the fixing on a particular number cannot be done by the forethought of man, but muſt be regulated by the precepts of the ſacred writings; and as no precept has been iſſued on this head, it is proper to conſign it to the judgment of him who is beſt acquainted with the matter, namely, the hunter. According to a former tradition, *Haneefa* holds the game of the third time to be lawful;—whilſt the two diſciples maintain that it is not lawful, as the animal does not become trained until after the third time; and conſequently the game of the third time is the game of an untrained animal, and, as ſuch, is unlawful; this being like the act of a ſlave in the preſence of his maſter; in other words, if a ſlave perform any acts in the preſence of his maſter, ſuch as purchaſe or ſale, and the maſter, ſeeing and knowing the ſame, remain ſilent, the ſlave in that caſe becomes *licenced*,—not only with reſpect to the act in queſtion, but alſo with reſpect to every act which he may afterwards perform;—and ſo likewiſe in the caſe in queſtion. The reaſoning of *Haneefa* is, that when the animal takes the game the third time, and inſtead of eating preſerves it, this argues it to have been trained at the time of taking the game, and conſequently the game of the third time is the game of a *trained animal.*—It is otherwiſe in the caſe above cited, becauſe *licence* is a notification, and cannot take place without the knowledge of the ſlave; and the ſlave cannot acquire this knowledge until *after* he has performed the act, and his maſter remained ſilent.

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* Arab. *Aſſid*; including *lions*, and every other creature of the feline tribe, except the *panther* before mentioned.

† The expreſſion, in the original, ſignifies *to ſend off*.—It here means the act of *caſting* the hound or hawk, and hunting them at the game.

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[*] This ſtory (of which an explanation was given to the tranſlator) is probably the original of *Parnell's Hermit*.

[†] The *Arabs*, having a *dual* number, do not of courſe admit two to conſtitute a plurality.

If a perſon let ſlip his trained dog, or his trained hawk, and at the time of letting them ſlip repeat the name of God, or omit it from forgetfulneſs, and the dog or hawk catch the game, and wound it ſo that it dies, the game may in that caſe lawfully be eaten.—If, however, he ſhould *wilfully*, and not from *forgetfulneſs*, omit the name of God, it is not then lawful to eat the game ſo taken. It is mentioned in the *Zâhir Rawâyet* that the wounding of the game is a condition of its lawfulneſs, as it furniſhes the means of a *Zabbah Iztirâree.* (The meaning of *Zabbah Iztirâree* has already been explained in treating of *Zabbah.)*

at leaſt, muſt not be *wilfully* omitted) at the time of letting ſli hound,

If a dog or panther eat any part of the game, it is unlawful to eat of ſuch; but if a hawk eat part of it, it may lawfully be eaten.—The diſtinction between theſe two caſes has already been xplained.

A

it unlawful.

If a dog (for inſtance) catch game ſeveral times without eating it, and afterwards catching game eat part of it, ſuch game cannot lawfully be eaten, as the circumſtance of the dog eating it is a proof that he has not been properly trained. In the ſame manner alſo, the game which he may afterwards take is not lawful until he ſhall have been trained anew, concerning which the ſame difference of opinion obtains as that already ſet forth concerning a training in the *beginning*. With reſpect to the game previouſly taken by him, illegality does not attach to ſuch parts of it as have been eaten, ſince there the *ſubject* no longer remains; but with reſpect to ſuch parts as have not been preſerved, (that is, have been left upon the plain,) they are unlawful according to all our doctors. As to what may have been preſerved, (that is, what the hunter may have carried to his own houſe,) it is unlawful, according to *Haneefa*. The two diſciples maintain it to be lawful; for they contend that the circumſtance of the dog eating at that time is no argument of his not having been previouſly trained, as an art may be acquired and afterwards forgotten. The argument of *Haneefa*, on the contrary, is that the dog's eating of the game at that period is a proof of his never having been properly trained from the firſt.

Game caught by a hawk, after it has returned to its wild ſtate, is not lawful.

If a hawk fly from its maſter, and remain for a while in a ſtate of wildneſs and flight, and afterwards catch game, ſuch game is not lawful, as the hawk in that ſtate is not *trained*; for the ſign of being trained is to return to its maſter; and as it did not ſo return, the ſign no longer remains; whence it is conſidered in the ſame light as a dog which eats his game.

A dog does not render his game unlaw-
taking
d;

If a dog eat the *blood* of his game, and not the *fleſh*, the game is lawful, and capable of being eaten, as the dog has preſerved it for his maſter, which argues him to have been well trained, ſince he eat merely what was unfit for his maſter, and preſerved what was fit for him.

If a hunter, having taken the game from his trained dog, cut off a piece of it, and throw it to the dog, and the dog eat the ſame, ſtill the remaining part of it is lawful, as it is not then game; the caſe being, in fact, the ſame as if a perſon were to throw to a dog any other kind of food. The law is the ſame where a dog leaps upon his maſter, and takes from him part of the dead game in his hands and eats it; this being ſimilar to where a dog attacks his maſter's goat, and kills it, which is no proof of the dog's not being *trained.*

or by c
a piece or t
*fleſh* cut off

If a dog lay hold of game with his teeth, and having bitten off the part eat it, and afterwards catch the game and kill it, without eating any other part of it, the game is unlawful; becauſe upon the dog eating part of his game it becomes evident that he is not *trained.* If, on the contrary, he drop the part bitten off, and having purſued the game kill it and deliver it up to his maſter without eating any part of it, and having afterwards paſſed by the part bitten off eat the ſame, the game is lawful; for as, if the dog, under theſe circumſtances, had eaten part of the body of the game in the hands of his maſter it would have been of no conſequence, it follows that it is, *a fortiori*, of no conſequence where he eats what was ſeparated from it, and unlawful to the maſter to eat. It is otherwiſe in the former caſe; becauſe there the dog eat in the very act of hunting; and alſo, becauſe the tearing off a piece of fleſh with the teeth admits of two explanations; for firſt, this may be done with a view to devouring,—and ſecondly, it may be done with a view merely to weaken the animal, in order the more eaſily to catch it;—and the eating of the piece before catching the animal argues the *firſt* of theſe,—whereas the eating of it after catching and delivering the game to the hunter argues the *ſecond*, whence no inference can be drawn that the dog is not *trained.*

Caſe of a dog
biting off a
piece in the
purſuit of his

If a hunter take game alive which his dog had wounded, it is incumbent upon him to ſlay it according to the preſcribed form [of *Zabbah*,]

Game taken
*alive*
ſlain
*bah,*

*Zabbah*,] and if he delay ſo doing until it die, it is then carrion and incapable of being eaten. The law is the ſame with reſpect to game taken by a hawk, or the like; and alſo with reſpect to game ſhot by an arrow. The reaſon of it is, that in this caſe the hunter is capable of the *original* obſervance, namely, *Zabbah Ikhtiàree*, before the occurrence of the neceſſity for the *ſubſtitute*, namely, *Zabbah Iztiràree*; and therefore the validity of the ſubſtitute is annulled. This law, however, ſuppoſes a capability in the hunter to perform the *Zabbah*; for where he takes the game alive, and is incapable of performing the *Zabbah*, and there exiſts in the animal more life than in one whoſe throat has been juſt cut, ſuch game (according to the *Zâhir Rawâyet*) is not lawful. It is related, as an opinion of *Haneefa* and *Aboo Yooſaf*, that it is lawful; (and this opinion has been adopted by *Shafeï*;) becauſe the hunter is not in this caſe capable of the *original* obſervance, and is therefore in the ſame ſituation as a perſon neceſſitated to uſe ſand inſtead of water, notwithſtanding he be in ſight of water. The reaſon alleged in the *Zâhir Rawâyet* is, that the hunter's finding the animal alive is equivalent to his capability of performing the *Zabbah*, ſince it enables him to reach the throat of the animal with his hand. Hence he has, in a manner, the power of performing the *Zabbah*, which he neglects. It is otherwiſe where only as much life exiſts in the animal as in one whoſe throat has been cut; becauſe it is then, in effect, dead,—whence it is that if, in that ſtate, it ſhould fall into water, it is not unlawful, any more than if it had fallen into water when actually dead, the dead not being a fit ſubject for *Zabbah*. Some of the learned have entered more particularly into this caſe, alleging that if the inability to perform the *Zabbah* ariſe from the want of an inſtrument, it is not then permitted to eat it; and that if the inability ariſe from the want of time, in that caſe likewiſe it is not permitted to eat it, according to our doctors,—in oppoſition to the opinion of *Shafeï*. The argument of our doctors is, that when the animal is taken alive it is no longer game, becauſe the term *game* is applicable only to what is *wild* and *free*; and that therefore the *Zabbah Iztiràree* is then of no effect. What is here recited proceeds on the ſuppoſition of the animal being taken alive, and of there being a poſſibility of its continuing to live; for if there be no poſſibility of its continuing to live, (as where its belly has been torn, and part of its entrails have come out,) it may lawfully be eaten without the performance of *Zabbah*, becauſe the life that remains in it is equivalent only to the ſtruggling of an animal whoſe throat had been cut, and is conſequently of no effect;—in the ſame manner as where a goat falls into water, after having had its throat cut.

provided it live long enough to admit of performing this ceremony.

If the hunter find the game alive, and do not take it from his dog till it be dead, and there have been ſufficient time, after he found it alive, to perform the *Zabbah*, it is not in that caſe lawful to eat it; becauſe this is equivalent to an omiſſion of the *Zabbah*, notwithſtanding an ability to perform it. If, on the contrary, he had found it alive at a period when, if he had taken it, there was not ſufficient time to perform the *Zabbah*, it is lawful.

**The game taken is lawful although it be not the ſame that was intended by the hunter.**

If a hunter let ſlip his dog at game, and the dog take ſome other game, the game ſo taken is lawful. *Malik* has ſaid that it is not lawful, ſince the dog took this game without having been let ſlip at it, as it was at *another* ſpecific animal that the hunter let him ſlip. Our doctors, on the other hand, argue that the object of the hunter is merely *the acquiſition of game*; and all game is the ſame to him. Beſides, the ſpecification of the particular animal is of no advantage, as it is impracticable to teach a dog to take that particular animal.

**Rule in ing off *ther* at**

If a perſon let ſlip a panther at game *, and the panther lie for a while in ambuſh, and then catch and kill the game, it is lawful to eat it; becauſe the lying in ambuſh being with a view to catch the game, and not to take reſt, does not of conſequence terminate the act of letting it ſlip. The ſame rule alſo holds with reſpect to a dog, when trained in the manner of a panther.

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* The *lynx* or *panther* uſed in hunting is generally kept *hooded*, and is conveyed from place to place upon a ſort of litter. When the hunters have approached within ſight of their game, they unhood the panther and caſt off his chains, and he inſtantly ſprings at his prey, if within his reach, or if otherwiſe, practiſes a variety of ſtratagems to get near to it.

All the game caught by the dog, &c. under one invocation, is lawful. Rule for determining this with reſpect to dogs,

If a dog be let ſlip at game, and take and kill it, and afterwards take and kill other game, both are lawful; becauſe the act of letting him ſlip continues to operate, and is not terminated until after the taking of the ſecond game; this caſe being ſimilar to that of a perſon ſhooting at an animal with an arrow, which not only hits and kills it, but alſo hits and kills another. If, on the contrary, the dog, after killing the firſt game, lie down upon the ground and reſt for a long time, and then, ſome other game paſſing by, he riſe up and kill it, it is not lawful to eat that other game; becauſe when the dog lay down and took reſt, he thereby determined the act of letting him ſlip, ſince his ſitting down was with a view to take reſt, and not to deceive the game; in oppoſition to what was before recited.

and hawks.

If a hawk, being let ſlip [caſt off] at game, firſt perch upon ſomething, and afterwards, going in queſt of the game, take it and kill it, it is lawful to eat it. This, however, proceeds on the ſuppoſition of the hawk neither tarrying long, nor with a view to reſt, but merely a ſhort time, and with a view to *ſurprize* her prey.

lawful when

hawk, &c.)
independant
of the act of
the hunter.

F a trained hawk catch game and kill it, and it be not known whether any perſon let her ſlip at ſuch game, it is then unlawful to eat it; becauſe in this caſe a doubt exiſts with reſpect to the *lettin*

and game is not lawful unleſs the animal which takes it be let ſlip at it.

It is requiſite to its [illegible] (when dead) that

If game be *ſtrangled* by a dog, and not *wounded*, it is not lawful to eat it; becauſe the *wounding* of it is a condition of its legality, according to the *Zâhir Rawâyet*, (as has been before mentioned;) and this condition implies that where merely particular members of the game are broken by the dog it is not lawful to eat it.

*blood* been [illegible] from it.

Game is

illegality in

If a trained dog be aſſiſted in killing the game by a dog that is not trained, or by a dog belonging to a *Magian*, or by one upon which the invocation had been wilfully omitted, in that caſe the game is unlawful; becauſe two cauſes are here united, namely, a cauſe of legality, and a cauſe of illegality, and caution dictates a preference to the cauſe of illegality.

Game hunted down

pe

qualified

perform

ful.

Any perſon not permitted to perform *Zabbah* (ſuch as an apoſtate, or a perſon who wilfully omits the invocation) is the ſame as a *Magian* with reſpect to letting looſe an animal of the hunter tribe.

If a dog, without being let ſlip, ſhould of himſelf purſue game, a *Muſſulman* repeat the invocation, and then make a noiſe and incite the dog to run faſter, and the dog catch the game, it is in that caſe lawful to eat it.

Game killed at a *ſecond* catching of it (either by the ſame or a *ſecond*) lawful.

If a *Muſſulman*, having repeated the invocation, let ſlip his dog at game, and the dog having purſued and caught the game, and thereby rendered it weak, let it go, and afterwards catch it a ſecond time and kill it, it is in that caſe lawful to eat it;—and ſo likewiſe where a *Muſſulman* lets ſlip *two* dogs, and one of them renders the game weak, and the other kills it;—and alſo, where two men let ſlip their dogs, (that is, each of them one dog,) and one of the dogs renders the game weak, and the other kills it. In this laſt caſe, however, the game is the property of him whoſe dog rendered it weak; becauſe he deprived it of the quality of game, as he diſabled it from running.

## SECT. II.

### *Of ſhooting Game with an Arrow**.

Game ſlain *at random*, on hearing a iſe, is lawful, provided the noiſe proceed from game.

IF a perſon hear a noiſe, and, imagining it to be that of game, an arrow, or let ſlip his dog or hawk, and in either caſe game be killed, and it be afterwards diſcovered that the noiſe did actually proceed from game, it is then lawful to eat the game ſo killed by the arrow, dog, or hawk, whether it were the game of which the noiſe was heard, or not; becauſe the object of the hunter was merely *to get game*, of whatever kind. This is according to the *Zâhir Rawâyet*.—It is related as an opinion of *Aboo Yooſaf*, that a hog is in this caſe an exception;—in other words, if it be afterwards known that the noiſe proceeded from a *hog*, the game killed by the arrow, hawk, or dog, is not lawful; becauſe a hog is in an exceſſive degree impure;—whence it is that no part of it is rendered allowable by hunting:—contrary to other quadrupeds, for of thoſe the ſkin, by their being hunted, is rendered lawful. *Ziffer* has likewiſe excepted all thoſe animals of which the fleſh is not fit for eating, inaſmuch as the hunting of theſe is not with a view to render them lawful.

Game ſhot by an arrow aimed at another animal is lawful.

IF an arrow be ſhot at a bird and hit other game, and the bird ſhot at fly away, without its being known whether it was wild or tame, the game is in that caſe lawful, becauſe the probability is that the bird was a *wild* one. If, on the contrary, an arrow be ſhot at a camel, and hit game, and the camel having eſcaped, it be not known whether it was a wild one or otherwiſe, the game in that caſe is not lawful, becauſe the natural condition of a camel is that of tameneſs and attachment to man.—If, on the other hand, an arrow be ſhot at fiſh or locuſts, and hit game, ſuch game is lawful, in the opinion of *Aboo Yooſaf*, according to one tradition, inaſmuch as it is *game*: but according to another tradition it is unlawful; becauſe hunting is equivalent to the performance of *Zabbah*, which is not requiſite with reſpect to fiſhes and locuſts.

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* The title of this ſection, in the *Arabic* verſion, is ſimply *Râma*, ſignifying the uſe of any miſſile weapon whatever.

If a perſon, hearing a noiſe, and imagining it to be that of a man, ſhould in conſequence ſhoot an arrow, and kill game, and it be afterwards diſcovered that the noiſe proceeded from the game, in that caſe the game ſo killed is lawful; becauſe, when it actually proves to be *game*, the imagination of the perſon who ſhoots is of no conſequence.

*Invocation* muſt be made on the inſtant

If a hunter, upon ſhooting his arrow, repeat the invocation, and the arrow wound and kill the game, it is lawful to eat it; becauſe the ſhooting of an arrow along with the invocation, and the wounding of the animal, is equivalent to the performance of *Zabbah*. Nevertheleſs, if the animal be taken alive, it is incumbent to ſlay it by *Zabbah*, as has been already ſet forth in the firſt ſection.

but if the animal be taken alive, it muſt ſtill be

wounded, and after-

If an arrow hit game, and the game fly away with the arrow until it diſappear, and the hunter go in ſearch of it, and find it dead, it is in that caſe lawful to eat it. If, on the contrary, he ſhould *not* follow or go in ſearch of it, and afterwards happen to find it dead, it is not in that caſe lawful; becauſe it is related that the prophet held it abominable to eat that game which diſappeared from the ſight of the bowman; and alſo, becauſe there is a poſſibility that it may have died from ſome other cauſe.

If the hunter above mentioned find another wound in the game beſides that of his arrow, it is not lawful to eat it, notwithſtanding he

upon it.

may have continued in the ſearch of it until he found it; becauſe in this caſe two cauſes are conjoined,—one of illegality, namely, the other wound,—and one of legality, namely, the wound of his arrow; and it is the eſtabliſhed cuſtom to give the preference to the cauſe of illegality. Moreover, caution is eaſily obſerved in this caſe, as it is an uncommon one. All that has been above recited relates to the ſhooting of an arrow; but it is equally applicable throughout to the letting ſlip of a *dog*, or ſo forth.

which, being ſhot, falls into water, or upon any building, &c. before it reaches the ground, is unlawful.

IF a perſon ſhoot at game with an arrow, and hit it, and it fall into water, or upon the roof of a houſe, or ſome other eminence, and afterwards upon the ground, it is not lawful to eat it; becauſe the animal is in this caſe a *Mootradeea*, the eating of which is prohibited in the KORAN; and alſo, becauſe there is a ſuſpicion that the death may have been occaſioned by the water, or by the fall from the eminence, and not by the wound [*].

Rule with reſpect to *water*-fowl.

IF a water-fowl be wounded, and the member wounded be not a part under water, it is lawful,—whereas, if it be a part under water, it is not lawful, in the ſame manner as a *land* bird, which being wounded falls into water.

Game ſlain by a *bruiſe*, without a *wound*, is not lawful.

GAME hit [ſtunned] by an arrow without a ſharp point is unlawful, as it is ſo recorded in the traditions. It is to be obſerved, moreover, that the *wounding* of game is a condition of its legality; becauſe a *Zabbah Iztirârce* cannot otherwiſe be eſtabliſhed,—as has been already mentioned [†]

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[*] Amidſt ſuch a maſs of frivolous abſurdity, the tranſlator thinks it unneceſſary to offer any apology for the omiſſion, in this place, of a long diſcuſſion ſtill more futile than any thing which has gone before.

[†] From this, and various preceding paſſages, it appears that it is requiſite to *draw blood* in order to the rendering game lawful.

GAME killed by a bullet from a croſs-bow is not lawful, as this miſſile does not wound, and is therefore like a blunt arrow. A *ſtone*, alſo, is ſubject to the ſame rule, as it does not wound;—and game is alſo unlawful when killed by a great heavy ſtone, notwithſtanding it be ſharp; becauſe there is a probability that the game may have died from the weight of the ſtone, and not from the ſharpneſs of it. If, however, the ſtone be ſharp, and not weighty, the game killed by it is lawful, as it is then certain that it muſt have died in conſequence of a *wound* from it.

GAME killed by a ſmall pebble ſtone, and of which no part has been cut by the ſtone, is not lawful, becauſe in this caſe the game is *bruiſed* and not *wounded*. If, alſo, game be beaten by a ſtick or piece of wood until it die, it is not lawful, as the death is then occaſioned by the *weight* of the ſtick or piece of wood, and not by any *wound*: yet if, in this caſe, the ſtick or piece of wood, becauſe of their ſharpneſs, occaſion a wound, there is no impropriety in eating the game, as the ſtick and piece of wood are then equivalent to a ſword and ſpear. The general rule, in ſhort, in theſe caſes, is that when it is known with certainty that the death of the game was occaſioned by a *wound*, it is lawful food; but unlawful where the death is known with certainty to have been occaſioned by a *bruiſe*, and not a *wound*; and that, in caſe of the exiſtence of a doubt, (that is, where it is not certainly known whether the death was occaſioned by a bruiſe or by a wound,) it is then alſo unlawful, from a principle of caution.

IF a perſon throw a ſword or a knife at game, and the game be ſtruck by the *handle* of the ſword, or the *back* of the knife, it is not lawful; whereas if ſtruck by the *edge*, and wounded, it is lawful.

Caſe of cutting off the of an animal.

If a perſon cut off the head of a goat, it is lawful to eat it, as the jugular veins have been cut through; but it is nevertheleſs abominable. If, however, a perſon perform this action by beginning with the ſpine, ſo as to occaſion the death of the animal before the jugular veins be cut, it is not lawful: but it is lawful if the animal do not die until after the jugular veins are cut.

A *Magian*, an *apoſtate*, or an *idolator* are not qualified to kill game.

Game killed by a *Magian*, an apoſtate, or a worſhipper of images, is not lawful, becauſe they are not allowed to perform *Zabbah*, (as has been already explained in treating of that ſubject,) and *Zabbah* is a condition of the legality of game. It is otherwiſe with reſpect to a *Chriſtian* or a *Jew*, becauſe, as their performance of a *Zabbah Ikhtiàree* is lawful, it follows that their performance of a *Zabbah Iztiràree* muſt alſo be lawful.

of game wounded by

If a perſon ſhoot an arrow at game, and hit it, without rendering it ſo weak as to prevent it from running, and in that ſtate another perſon ſhoot at it, and kill it, the game is the property of the ſecond hunter, becauſe he was the perſon who took it, and the prophet has ſaid, "*Game belongs to him who takes it.*" If, on the contrary, the firſt hunter render it too weak to run, and another perſon then kill it, it is in that caſe the property of the firſt hunter. Nevertheleſs, he muſt abſtain from eating it, as there is a probability that it may have died in conſequence of the ſecond wound; and as it had not the power of running after the firſt wound, it ought to have been ſlain by a *Zabbah Ikhtiàree*, no regard being, in ſuch an inſtance, paid to the *Zabbah Iztiràree*, in oppoſition to the former caſe.—This prohibition, however, againſt eating the game, proceeds on the ſuppoſition of its being in ſuch a condition as to induce us to believe the continuance of its exiſtence poſſible; ſince under theſe circumſtances its death is referred to the ſecond ſhot: but if the firſt wound be ſuch as to render the continuance of its exiſtence impoſſible, (as if it have as little life in it as an animal with its throat cut, having, for inſtance, had its *head* cut off,) in that caſe it is lawful to eat it, as its death is not then referred to the ſecond ſhot, it being at that period in a ſtate equivalent to annihilation. If, however, the firſt wound be ſuch as to render the ſurvival of the game impoſſible, and there neverthleſs be more life in it than in an animal with its throat cut, (as if, for inſtance, it be capable of living *one day*,) in that caſe, according to *Aboo Yooſaf*, it is not rendered unlawful by the ſecond ſhot, becauſe ſuch a degree of life (in his opinion) is of no effect; but according to *Mohammed* it is unlawful, as ſuch a degree of life (in his opinion) is o

In the foregoing caſe, the ſecond hunter is reſponſible to the firſt for the value which the game bears after receiving the firſt wound; becauſe he [the ſecond hunter] has deſtroyed game the property of the firſt hunter, (who became the proprietor of it in conſequence of his wounding it, and thereby incapacitating it from running;) and the game is, by ſuch wound, rendered *defective*; and in all caſes of reſponſibility for deſtruction of property a regard is paid to the *time* of the deſtruction. The compiler of the *Hedáya* remarks that in this caſe there is a diſtinction;—in other words, reſponſibility takes place where it is known that the game in queſtion died in conſequence of the ſecond wound; (that is, where the wound of the firſt hunter was ſuch that the animal lived after it,—and the wound of the ſecond hunter ſuch as to deſtroy the exiſtence;) and the ſecond hunter is accordingly reſponſible for the value of the game, in its *wounded* and *defective*, not in its *unwounded* and *perfect* ſtate; in the ſame manner as where a perſon kills the ſick ſlave of another. If, however, it be known that the game died in conſequence of the *firſt* wound, or if it be uncertain of which wound it died, *Mohammed* has ſaid, in the *Zeeadát*, that it is incumbent upon the ſecond hunter, firſt to pay a compenſation for the damage he may have occaſioned to the game by the wound; and, ſecondly, to pay a compenſation for half the value which the game bore after receiving both wounds; and, thirdly, to pay a compenſation of half the value of the fleſh. The reaſon for the firſt compenſation is that the ſecond hunter, having occaſioned a damage to an animal which was the property of another, is bound, in the firſt inſtance, to make good the amount of that damage. The reaſon for the ſecond compenſation is that, as the animal died of *both* wounds, the ſecond wound muſt have been the immediate cauſe of its deſtruction; and as it was at that time the property of another perſon, it is incumbent upon him to make a compenſation for *half* the value which it bore after receiving both wounds, as the firſt wound did not proceed from him. (With reſpect to the damage occaſioned by the ſecond wound, having paid it before, he is not required to pay it again.) The reaſon for the third compenſation is that, as the game, after receiving the firſt wound, was in ſuch a ſtate as to have rendered it lawful by a *Zabbah Ikhtiàree*, if it had not received the ſecond wound, it follows that the ſecond hunter, in conſequence of the ſecond wound, did render unlawful half of the fleſh with reſpect to the firſt hunter. He is only required, however, to pay a compenſation for one *half* of the fleſh, as he paid the other half before, inaſmuch as he paid half the *value*, which included the fleſh.

Caſe of game firſt *wounded*, and then *killed* by the ſame perſon.

If, inſtead of *two* perſons ſhooting the game, *one* perſon ſhoot the ſame game *twice*, the law is then the ſame with reſpect to the illegality of the game as when it receives two wounds from two different perſons;—this being ſimilar to where a perſon, having ſhot game upon any eminence, and rendered it weak and feeble, afterwards ſhoots it a ſecond time, and brings it to the ground,—in which caſe the game ſo killed is unlawful, inaſmuch as the ſecond wound is the cauſe of illegality; and ſo alſo in the caſe in queſtion.

THE hunting of every ſpecies of animal is lawful, whether they be fit for eating or otherwiſe; becauſe the legality of *hunting* has been abſolutely declared in the KORAN without reſtricting it to animals fit to eat. Another reaſon is, that the hunting of animals not fit for eating may proceed either from a deſire to obtain their ſkin, their wool, or their feathers, or from a wiſh to exterminate them on account of their being miſchievous or hurtful; and all theſe motives are laudable. All

# HEDAYA.

## BOOK XLVIII.

## *Of* RAHN, or PAWNS.

Chap. I. Introductory.

Chap. II. Of Things capable of being pawned; and of Things for which Pledges may be taken.

Chap. III. Of Pledges placed in the Hands of a *Truſtee.*

Chap. IV. Of the Power over Pawns; and of Offences committed *by* or *upon* them.

CHAP.

# CHAP. I.

Definition of

*RAHN* literally ſignifies to detain a thing on any account whatever. In the language of the LAW it means the detention of a thing on account of a claim which may be anſwered by means of that thing; as in the caſe of debt.—This practice is lawful, and ordained; for the word of GOD, in the KORAN, ſays, "GIVE AND RECEIVE "PLEDGES;"—and it is alſo related, that the prophet, in a bargain made with a *Jew* for grain, gave his coat of mail in pledge for the payment.—Beſides, all the doctors have concurred in deeming pawn legal; and it is, moreover, an *obligatory* engagement, and conſequently lawful, in the ſame manner as *bail.*

**Pawn is eſtabliſhed by declaration and acceptance; and confirmed by the receipt of the pledge.**

CONTRACTS of pawn are eſtabliſhed by declaration and acceptance, and are rendered perfect and complete by taking poſſeſſion of the pledge.—Several of the learned have ſaid that the contract is complete immediately upon the declaration; for as it is a deed purely *volun-* it therefore obtains its completion from the voluntary agent alone; as in caſes of gift and alms. The ſeizin of the pledge is, nevertheleſs, abſolutely requiſite to the obligation of the deed, as ſhall be ſhewn in its proper place. *Málik* has ſaid that a contract of pawn become valid and binding immediately upon the concurrence of the parties; becauſe they relate to the property of both, and are conſequently ſimilar to ſale.—One of the arguments advanced by our doctors is, the text of the KORAN, as above quoted; and another argument is, that as the act of pledging is purely *voluntary*, (whence it is that there is no *compulſion* on the pawner towards the act,) it muſt therefore be *effectually* concluded, in the ſame manner as in the caſe of legacies;—and a contract of pawn can only be effectually concluded by the ſeizin, in the ſame manner as a legacy is effectually concluded by the teſtator dying without having receded from his bequeſt. It is to be obſerved, that if the depoſitor *relinquiſh* the pledge to the pawnee, his ſo doing is equivalent to an acceptance; in other words, his not obſtructing the pawnee from taking poſſeſſion of the pledge is equivalent to his actually inveſting him with the poſſeſſion, and is a ſufficient proof of his having ſo done. This is recorded in the *Záhir Rawáyet*; and the reaſon of it is, that as the ſeizin of the pledge is ſanctioned in virtue of the agreement, it therefore reſembles the ſeizin of a thing ſold. It is recorded from *Aboo Yooſaf*, that the ſeizin of a *moveable* pledge can only be accompliſhed by the laying hold of, and removing it, not by the pawner's merely relinquiſhing it, as above mentioned; for the ſeizin of a pledge is an occaſion of reſponſibility *from the firſt*, in the ſame manner as uſurpation. The former is, however, the better opinion.

Upon the pawnee taking poſſeſſion of the pledge, the contract becomes binding;

and he [the pawnee] is reſponſible for the pledge.

Upon a perſon receiving a pledge which is diſtinguiſhed and defined, (that is, unmixed and disjoined from the property of the depoſitor,) the acceptance being then aſcertained, the contract is completed, and conſequently binding. (Until, however, the ſeizin actually take place, the pawner is at full liberty either to adhere to, or recede from the agreement, as the validity of it reſts entirely upon the ſeizin, without which the end and intention of a pledge cannot be anſwered.) Upon the pledge, therefore, being delivered to the pawnee, and his taking poſſeſſion of the ſame, he becomes anſwerable in caſe of its being deſtroyed in his hands. *Shafei* maintains that a pledge being a *truſt* in the hands of the pawnee, if it be deſtroyed in his poſſeſſion ſtill he does not on that account forfeit his due: becauſe it is recorded in the traditions, that "*no pledge ſhall be diſtrained* "*for debt, and the pawner ſhall be liable for all riſks,*" meaning, (according to *Shafeï*,) that if the pledge be deſtroyed, ſtill the debt is not annulled on account of any reſponſibility ariſing therefrom;—and further, becauſe a pledge being merely a *teſtimony*, the loſs of it does not annul the debt, ſeeing that a debt ſtill exiſts after the loſs even of a *written bond*; the reaſon of which is, that the uſe of taking ſuch a teſtimony is to add greater ſecurity to the pawnee's debt; and therefore if, from the decay or deſtruction of the pawn or teſtimony, the debt of the pawnee were cancelled, it would be oppoſite to the ſpirit of the agreement, ſince it would admit a poſſibility of the pawnee's right becoming extinguiſhed, a thing *repugnant* to *conſervation and ſecurity*. The arguments of our doctors upon this point are twofold.—FIRST, a tradition of the prophet, who once decreed the claim of a pawnee to be annulled, on account of the death of a horſe which he had in a pledge; (although, indeed, ſeveral of the learned, in their comments on this tradition, have remarked, that it was made at a time when the value of the horſe could not be aſcertained.)—SECONDLY, all the companions of the prophet, and their followers, have declared a pledge to be a ſubject of reſponſibility; that is to ſay, that if it decay in the hands of the pawnee, he ſuſtains the loſs.—With reſpect, moreover, to the aſſertion of *Shafeï*, that "a pledge "is a truſt," it is inadmiſſible, as being in direct contradiction to the concurrent opinion of the companions above-mentioned. With reſpect, alſo, to the tradition adduced by him as an argument, the real meaning of it is, "that a pledge cannot be completely ſeized, ſo as to "render it the abſolute property of the pawnee, in the room of his other "claim," an explication which *Koorokhee* has tranſmitted to us, as delivered by former ſages.—As, moreover, the pawnee is *entitled* to take poſſeſſion of the pledge as a ſecurity for his claim, and to detain it, (for *Rahn*, in its literal ſenſe, ſignifies detention,) it neceſſarily follows that a pledge is not a truſt.—In ſhort, in the opinion of our doctors, a contract of pawn requires that the pledge be continually detained in the hands of the pawnee in lieu of his debt, in this

which he is entitled to detain until he receive

way.

payment of his debt,

without ad- the to any uſe of it.

way, that it remain in his poſſeſſion as a ſecurity for the fulfilment of his claim;—whereas, in the opinion of *Shafeï*, the claim of the pawnee is connected with the *ſubſtance* of the pledge, as a *ſatisfaction* for his claim,—in this way, that he may ſell it, and thereby obtain a diſcharge,—it being until ſuch ſale a truſt repoſed in him, and the property of the depoſitor;—and agreeably to theſe different tenets ſeveral caſes occur concerning which there is a diſagreement between our doctors and *Shafeï*:—for inſtance,—if the pawner be deſirous of reſuming his pledge for a ſhort time, that he may enjoy the uſe of it, (as in the caſe of taking milk from a cow, or ſo forth,) he is not ſo allowed, according to our doctors, unleſs by the conſent of the pawnee, as the object of the agreement of pawn (namely, a *conſtant poſſeſſion*) would by that means be entirely defeated,—whereas, according to *Shafeï*, a pawner may even *forcibly* take back his pledge for a temporary enjoyment of the uſe, nor can he be prevented from this; becauſe (in his opinion) a pledge may be ſold conformably to the nature of the agreement; and the reſumption of it towards an enjoyment of the uſufruct cannot be conſidered as a ſubverſion thereof.—(More caſes of this kind ſhall be exhibited in the ſequel.)

The debt to which the pawn is op-

A CONTRACT of pawn is not valid unleſs oppoſed to a debt due at that time; for the end of ſuch contract is to eſtabliſh poſſeſſion in order to the *obtaining of payment*; and the *obtaining of payment* preſuppoſes an obligation of debt.

The reſpon- extends to the amount of the

A PLEDGE is inſured in the poſſeſſion of the pawnee[*] to whatever is the ſmalleſt amount,—the debt of the pawnee, or the value the pledge bore at the time of its being depoſited. Thus if a pledge equivalent to the amount of the debt periſh in the pawnee's hands, his

claim

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[*] In other words, “*The pawnee is reſponſible for it.*”

debt owing to the [illegible]

claim is rendered void, and he thereby, as it were, obtains a complete payment. If, on the contrary, the value of the pledge exceed the amount of the debt, the exceſs is in that caſe conſidered as a *truſt*, and the whole of the pawnee's claim is annulled, on account of the decay of that part of the pledge which is equivalent to the amount thereof; and the remainder [the exceſs,] as being held in truſt, is not liable to be compenſated for, and conſequently the pawner ſuſtains the loſs of it. If, on the other hand, the value of the pledge be *leſs* than the debt, the pawnee forfeits that part of his claim only which is equal to the value of the pledge, and the balance, or exceſs, muſt be paid to him by the pawner. *Ziffer* maintains that a pledge is liable to be compenſated for according to its value;—whence if a pledge of the value of one thouſand five hundred *dirms* at the time of delivery be deſtroyed, and the debt of the pawnee be one thouſand *dirms*, the pawner has a claim upon the pawnee for the difference, namely, five hundred *dirms*.—His arguments upon this point are twofold.—FIRST, a ſaying of *Alee*, "*The pawner and pawnee ſhall mutually reſtore to* "*each other the exceſs, whether the pledge exceed in value the debt, or* "*the debt the pledge.*"—SECONDLY, the amount in which the pledge exceeds the debt being (as well as the ſum equivalent to the debt) given in pledge, the exceſs is of conſequence a ſubject of reſponſibility as much as that part which is equivalent to the debt. Hence, when the debt is annulled, a reſtitution muſt be made of the ſurplus. The opinion of our doctors upon this ſubject is adopted from *Omar Farook*, and *Abdoolla-Ibn Maſaood.* They, moreover, argue, that as the pledge was taken poſſeſſion of purely for the purpoſe of obtaining payment it is therefore a ſubject of reſponſibility only in that degree of value from which the payment of the debt might have been made, as in the caſe of a *real* payment, the ſurplus being pawned merely from neceſſity, (as it was impoſſible to have pawned the *exact value* of the debt,) and therefore not demanding reſtitution.—With reſpect, alſo, to the ſaying of *Alee*, (as quoted by *Ziffer*,) the meaning of it is, that the parties ſhall mutually return the exceſs, in caſe of *ſale*, (that is to ſay, if the pawner *ſell* the pledge,) not in caſe of *deſtruction*, for he has elſewhere declared the ſurplus to be held by the pawnee in *truſt*.

The pawnee may demand payment of his debt, and imprison the pawner in caſe of con-

IT is lawful for the receiver of a pledge to make a demand of his debt, and even to impriſon the pawner in caſe of refuſal; becauſe the claim ſtill exiſts after the receipt of the pledge, which is not conſidered as a *fulfilment*, but merely as a *preſervative* of it. The pawnee, therefore, is not prohibited from making the demand; and if the circumſtance of the evaſions and delays of the pawner be made known to the *Kazee*, he muſt impriſon him, as has been formerly explained *.

It is required of the pawnee, before pay- [illegible] to pro- [illegible] he pledge;

WHENEVER a pawnee demands payment of his debt, it is requiſite that the *Kazee* order him firſt to produce the pledge; becauſe as he poſſeſſes that for the purpoſe of obtaining payment, it is not lawful for him to take his due at the ſame time that he retains poſſeſſion of the pledge, which he holds as a ſecurity; ſince if, in ſuch caſe, the pledge were to periſh in his hands, a *double* payment would be induced, which is inadmiſſible. And when the pawnee ſhall have produced the pledge, the *Kazee* muſt order the depoſitor firſt to diſcharge the debt, in order to aſcertain the *pawnee*'s right, in the ſame manner as the right of the *pawner* is aſcertained, to the end that both may be placed upon an equal footing; as in the caſe of bargains, where the ſeller having produced the goods, the buyer then lays down the purchaſe-money.

If he demand payment in a

IF the pawnee demand payment in a city different from that wherein the contract of pawn was concluded, and the pledge be of ſuch a

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* In treating of *the duties of* [illegible] KAZEE. (See Vol. II. p. 624.)

nature

he is not re quire to produce it unleſs this can be done without expence.

nature as neither to require charge of carriage or expence, the ſame rules which have been laid down in other caſes hold good in this; as the place for the ſurrender of a pledge of this kind being entirely immaterial and indifferent, the doctors have therefore aſſigned no particular rules or conditions regarding it. If, on the contrary, the pledge be of ſuch a nature as to require carriage and charges of removal, the pawnee is not deſired to produce it; for ſuch a requiſition would neceſſarily oblige him to have it carried from place to place. It is, moreover, incumbent on him to relinquiſh the pledge to the pawner, and to allow him to reſume it; but he is not required to remove it from one place to another, as that would be a loſs to him which he had not ſtipulated.

The may be ſold at the deſire of the pawner; and the pawnee cannot afterwards be required to produce it.

IF the pawner empower the truſtee[*] to ſell his pledge, and he ſell it accordingly, either for ready money or on credit, it is lawful, the power of the pawner to ſell it being indiſputable. If, therefore, the pawnee afterwards demand payment, he is not deſired to produce the pledge, as that, in ſuch caſe, is not in his power.—The ſame rule alſo holds where the pawnee, at the inſtance of the pawner, having ſold the pledge, does not poſſeſs himſelf of the purchaſe-money; for then the *Kâzee* may compel the pawner to diſcharge his debt, without requiring the pawnee to produce the pledge, which, becauſe of its having been ſold at the deſire of the pawner, has become converted into a *debt*,—wherefore the pawner himſelf did, as it were, pawn the purchaſe-money, (that is, the debt.)—If, on the contrary, the pawnee poſſeſs himſelf of the purchaſe-money, he muſt in that caſe be required to produce it upon demanding his debt; for as the money is a commutation for the pledge, it is therefore a ſubſtitute for it. It is to be obſerved, however, that in the above caſe the pawnee has a right to the poſſeſſion of the purchaſe-money; for as he himſelf made the ſale, the rights of the contract conſequently appertain to him.

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[*] Arab. *Adil*; meaning (literally) an *upright* perſon,—one in whoſe hands the parties mutually agree that the pledge ſhall remain until it be redeemed. The tranſlator ſubſtitutes the term *truſtee* throughout this book, becauſe (although not the literal meaning of *Adil*) it beſt expreſſes the ſenſe of the author.

He muſt produce it on re- a *al* pay- t, as well as in caſe of a complete diſcharge.

In the ſame manner as the pawnee is required to produce the pledge when he is about to receive payment of his debt in full, he is alſo required to produce it when he receives part payment, provided the term ſtipulated be expired; becauſe his thus producing it can be of no prejudice to him, whilſt at the ſame time it ſerves to diſſipate any apprehenſion of the loſs of the pledge which may have ariſen in the mind of the pawner. The pledge, however, is not to be reſtored until a complete diſcharge be made. If, alſo, the pledge ſhould have been *ſold* by the pawnee, and the purchaſe-money taken poſſeſſion of by him, he is required to produce ſuch purchaſe-money upon demanding payment of his debt, or of *part* of it, in the ſame manner as he is required to produce the pledge itſelf, in caſe of its being extant, as the purchaſe-money is a ſubſtitute for the pledge.

If a perſon ſhould, by miſadventure, kill a pawned ſlave, and the magiſtrate decree the value of ſuch ſlave to be made good by the *Akilas* of the ſlayer within the term of three years, the pawner muſt not be compelled to diſcharge the pawnee's debt until he [the pawnee] ſhall have produced the full value of the ſlave; for, in this caſe, the value is a ſubſtitute for the ſlave who was in pawn; and it is conſequently incumbent on the pawnee to produce the whole of his value, in the ſame manner as he is required to produce the whole pledge where it is extant. Here, moreover, the pledge has not become converted into value by any act of the pawner;—whereas, in the caſe formerly ſtated, (namely, where the pawnee ſold the pledge at the deſire of the pawner without poſſeſſing himſelf of the purchaſe money,) the pledge was converted into debt by the act of the pawner, ſince he inveſted the pawnee with a power of diſpoſal. There is conſequently an eſſential difference between theſe two caſes;—whence it is that, in the preſent inſtance, it is incumbent on the pawnee to produce the value received for the ſlave, whereas, in the former caſe, he is not required to produce the pledge, nor yet its price, as of that he had never received poſſeſſion.

Caſes in which he is not required to produce it.

IF the pawner deliver the pledge into the hands of a *truſtee*, ordering him, at the ſame time, to reſign it in charge to ſome one elſe than the pawnee, and he accordingly do ſo, in that caſe the pawnee is not required to produce the pledge upon demanding payment of his debt, for this is rendered impoſſible, from its not having been intruſted to his care, but to that of another.—If, alſo, the truſtee, having committed the pledge into the hands of one of his relations, ſhould then abſcond, and the perſon to whom it was given acknowledge, upon its being demanded from him, that "he had indeed received it in truſt, but was ignorant of the real proprietor," the pawner may be compelled to diſcharge his debt, without the pawnee being required to produce the pledge, as he had never received it;—(and the ſame rule alſo holds, where the truſtee abſconds, carrying the pledge along with him, without its being known whither he is gone.)—If, on the other hand, the truſtee deny the goods entruſted to him to be a pledge, aſſerting that "they are his own property," the pawnee cannot take any thing from the pawner until the contrary be proved; becauſe the denial of the truſtee is tantamount to a deſtruction of the pledge; and when a pledge is deſtroyed, the pawnee is conſidered as having received payment of his debt, after which he is no longer at liberty to claim it.

The pawner cannot re-claim the pledge on the plea of *ſelling* it for the diſ- of his

If the pawner demand a reſtitution of the pledge with a view to it, and thereby pay off his debt, ſtill it is not incumbent on the pawnee ſo to do, as the contract of pawn requires that the pledge be continually detained in the hands of the pawnee until ſuch time as his debt be paid.—If, alſo, the pawner diſcharge the debt in *part*, ſtill it remains with the pawnee to keep poſſeſſion until he ſhall have received payment of the balance: but whenever a complete payment is made, the pawnee muſt be directed to reſtore the pledge to the pawner, as the obſtacle to his ſo doing no longer exiſts, the claimant having obtained his due.

The pawnee muſt reſtore t he has pledge periſh in his hands.

If, after the diſcharge of the debt, the pledge ſhould be deſtroyed with the pawnee, he muſt return the money he received in payment; for as, upon the pledge periſhing in the hands of the pawnee, he appears to have received payment in virtue of his previous poſſeſſion of it, he therefore appears to have taken payment *twice*, and conſequently muſt return what he has received. In the ſame manner, if the pawner and pawnee ſhould, by mutual conſent, diſſolve the contract of pawn, the pawnee may, nevertheleſs, keep poſſeſſion of the pledge until ſuch time as he receive payment of his debt, or exempt the pawner therefrom.

The contract is not diſ- until the pledge be reſtored.

A contract of pawn is not rendered void until the pawnee reſtore the pledge to the pawner, according to the preſcribed mode of annulment.

The debt is the pledge.

If the pledge periſh in the hands of the pawnee, after the parties have in concert diſſolved the contract, his debt is in that caſe conſidered as diſcharged, provided the value of the pledge be adequate to it, the agreement being ſtill held in force.

The pawnee is not entitled to *uſe* the pledge;

IT is not lawful for the pawnee to enjoy, in any ſhape, the uſufruct of the pledge.—If, therefore, a ſlave be pawned, the pawnee muſt not employ him in ſervice; if a houſe, he muſt not dwell in it; and if clothes, he muſt not wear them;—for the right of the pawnee is in the *poſſeſſion*, not in the *uſe*.—Neither is a pawnee authorized to ſell the pledge, unleſs at the deſire of the pawner.

or to *lend* or let it to *hire*.

A PAWNEE is not permitted to let out, or give the pledge in loan; for as he is himſelf prohibited from enjoying any uſe of it, he conſequently is not authorized to confer the power of enjoyment upon another. If, therefore, he do ſo, it eſtabliſhes a tranſgreſſion: but a tranſgreſſion does not occaſion a diſſolution of the contract.

He may conſign it in charge to any of his family.

A PAWNEE may either watch over the pledge himſelf, or he may devolve the care of its preſervation upon his wife, child, or ſervant, provided they be of his family. If, on the contrary, he commit the care of it, or reſign it in truſt, to one who is not of his family, he becomes the ſecurity, and the perſon to whom he gave it the ſecondary ſecurity. Concerning this, however, there is a difference of opinion between *Haneefa* and his two diſciples; for he does not conſider the other perſon to be a ſecondary ſecurity; whereas they have declared it to be in the option of the pawner to make whomſoever he may pleaſe the ſecondary ſecurity.

If he *tranſgreſs* with reſpect to it, he is [illegible] for [illegible] value.

IF a pawnee commit any tranſgreſſion * with reſpect to the pledge, he muſt make reparation to the whole amount of the value; in the ſame manner as in a caſe of uſurpation; for the amount in which the value of the pledge exceeds the debt is a truſt; and a tranſgreſſion with reſpect to a truſt, renders the perſon who commits it liable to make complete reparation.

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* Such as converting it to his own uſe, &c. (as prohibited above.)

The *uſe* of

by the pawner's mode of keeping or wearing it.

If a perſon pledge a ring, and the receiver put it on his little finger, and it be afterwards loſt or deſtroyed, he is reſponſible, as he has tranſgreſſed in making uſe of the pledge inſtead of uſing means for its preſervation;—and, in this caſe, the right or left hand is indifferent, there being no uniform cuſtom of wearing a ring invariably upon either.—If, on the contrary, the pawnee wear the ring upon any other than his *little* finger, this is not conſidered as an enjoyment of uſe, but as a means of preſervation, as it is contrary to the cuſtomary mode of wearing a ring.—So likewiſe, if the pawnee wear a ſheet (which he has received in pledge) after the cuſtomary mode, he is reſponſible for it; whereas, if he ſpread it over his ſhoulders, he is not reſponſible.

If a perſon pawn two or three ſwords, and the pawnee fling them over his ſhoulder, then, provided there be only *two*, he becomes reſponſible for their value in caſe of their loſs, but not if there be *three*; the reaſon of which is, that amongſt warriors it is a frequent cuſtom to fling *two* ſwords on their ſhoulders in battle, but never to fling *three*.

If a perſon pawn two rings, and the pawnee put them both on his little finger, and it appear that he was accuſtomed to adorn himſelf in this manner, he is liable to make compenſation in caſe they be by any means deſtroyed; but if the contrary be proved, he is exempt from any reſponſibility.

The expences of *conſervation* [of the pledge] reſt upon the and thoſe upon the *pawn*

The rent of the houſe wherein the pledge is kept, as well as the wages of the keeper, reſt upon the pawnee:—but if the pledge be a living animal, and require a keeper and maintenance, the expence of theſe muſt be defrayed by the pawner.—It is to be obſerved that the wants of a pledge are of two kinds; I. ſuch as are requiſite towards the ſupport of the pledge and the continuance of its exiſtence;—II. ſuch as may be neceſſary towards its preſervation or ſafety, whether wholly or partly. Now, as the abſolute property of the pledge appertains to the pawner, the expences of the firſt claſs muſt therefore be defrayed by him; and as he has, moreover, a property in the *uſufruct* of the pledge, its ſupport and the continuance of its exiſtence for this reaſon alſo reſt upon him, being an expence attendant upon his property;—in the ſame manner as holds in the caſe of a *truſt*. (Of this claſs are the maintenance of a pledge in meat and drink, including wages to *ſhepherds*, and ſo forth; and the clothing of a ſlave, the wages of a nurſe for the child of a pledge, the watering of a garden, the grafting of fig-trees, the collecting of fruits, &c.) The expences of the *ſecond* claſs, on the contrary, are incumbent on the pawnee; becauſe it is his part to *detain* the pledge; and as the preſervation of it therefore reſts upon him, he is conſequently to defray the expence of ſuch preſervation. (Of the ſecond claſs is the hire of the keeper of the pledge; and ſo likewiſe the rent of the houſe wherein the pledge is depoſited, whether the debt exceed or fall ſhort of the value of the pledge.)—All that is here advanced is according to the *Záhir Rawáyet*. It is recorded, from *Aboo Yooſuf*, that the rent of the houſe is defrayed by the pawner, in the ſame manner as maintenance, it being his duty to uſe every poſſible means towards ſecuring the exiſtence of the pledge: but that a *Juál*, or reward for reſtoring a fugitive ſlave, is of the *ſecond* claſs; for as the pawnee is neceſſitated to uſe every poſſible expedient to recover the poſſeſſion of the ſlave, the reward, as being connected with preſervation, muſt be defrayed by him. This, however, holds only with reſpect to ſuch pledges as do not exceed the amount of the debt; for where the value of the pledge exceeds the amount of the debt, the pawnee muſt not be taxed with the payment of the *whole*, but with ſuch ſhare of it only as is proportionate to the value of the pledge; whilſt the remaining part, in proportion to the ſurplus, falls on the pawner; for the exceſs not being held by the pawnee in *pledge*, but in *truſt*, the reſtitution of the ſlave, in regard to the exceſs, is, as it were, made to the abſolute owner, to whom, therefore, the ſurplus muſt be charged.

but thoſe in-
by
or by
muſt
rayed
by *both*.

The expence of healing the wounds, of curing the diſorders, and of pecuniary expiations for the crimes of pledges, are defrayed by the pawnee and pawner proportionably to the amount of the debt, and the exceſs of the value of the pledge over the debt.

th

The taxes on pledges are levied from the pawner, as they are neceſſary towards the ſubſiſtence of his property.

(upon pawned land) preference to the right of the pawnee.

The tithe from the revenue of tithe-lands held in pawn, precedes the right of the pawnee; becauſe it is connected with both the *ſubſtance* and the *property* of the pledge, whereas the right of the pawnee is connected with the *property* of it only, not with the *ſubſtance*.—Still, however, the contract of pawn is not invalidated in regard to the ſum remaining after the payment of the tithe, as the obligation of tithe in no reſpect impugns the pawner's right of property. It is otherwiſe where an undefined part of a pledge proves the right of another; for in that caſe the contract becomes null with reſpect to the remainder, becauſe this ſhews that the pledge was not wholly the pawner's property.

If either party voluntarily defray what is incumbent on the other, he has no claim upon him on that account.

If either party defray any of the expences incumbent on the other, it is deemed a voluntary and gratuitous act. If, on the contrary, one of them ſhould, by order of the *Kázee*, fulfil a duty incumbent on the other, he has in that caſe a claim on the other for ſo doing, in the ſame manner as if he had done it at his inſtigation; for the *Kázee*'s juriſdiction is *general*. It is recorded, from *Haneefa*, that no claim can be made on the other, notwithſtanding the expence be defrayed by order of the *Kázee*, unleſs he were then abſent. *Aboo Yooſaf*, on the contrary, has ſaid that a claim is valid in both caſes; that is, whether the other were preſent or abſent.

CHAP.

## CHAP. II.

## Of Things capable of being pawned; and of Things for which Pledges may be taken.

*part* of an article cannot be

IT is unlawful to pawn an indefinite part of any thing. *Shafeï* maintains that it is lawful.—On behalf of our doctors two reaſons are urged. FIRST, this diſagreement ariſes from the difference of opinions regarding the object of pledges; for according to us, pledges are taken to be detained with a view to obtain payment of a debt, which cannot be effected in caſe the pledge be an undefined part of property; becauſe a ſeizin of things of that nature cannot be made, a real ſeizin being only practicable with reſpect to things which are defined and diſtinguiſhed;—whereas, according to *Shafeï*, the object of pledges is that the pawnee may ſell them to effect a diſcharge of his debt; and with this object pledges of the nature above mentioned are not in any ſhape inconſiſtent.—SECONDLY, it is an eſſential part of the contract of pawn, that the pledge be conſtantly detained in the hands of the pawnee until the redemption of it by the pawner; a condition which cannot be fulfilled with reſpect to pledges of the above nature; for in ſuch caſes it would be neceſſary that the pawner and the pawnee have poſſeſſion of the article alternately, whence it would be the ſame as if the pawner were to ſay to the pawnee, "I pawn it to you every "other day."—As, therefore, a conſtant detention is in ſuch caſe impoſſible, it follows that the pledge of an undefined part of any thing, whether capable of diviſion or incapable, is illegal.

even to a partner in the article.

It is not lawful to pledge any undefined part of joint property, even to a copartner; for, beſides that the detention of ſuch pledges cannot be made, the receiver would in ſuch caſe retain poſſeſſion of it, one day in virtue of property, and another in virtue of the contract of pawn; and thus he would hold it one day in pledge, and another not.

If the pledge be rendered indefinite by any ſupervenient act or circumſtance, the contract of pawn is annulled.

A supervenient indefiniteneſs is repugnant to the continuance of a contract of pawn, according to the *Mabſoot*;—in other words, if a perſon pledge a piece of ground, for inſtance, and afterwards deſire a truſtee * to ſell the half thereof, and the truſtee accordingly do ſo, the contract of pawn no longer exiſts.—It is recorded from *Aboo Yooſaf*, on the contrary, that a ſupervenient indefiniteneſs does not diſſolve a contract of pawn,—in the ſame manner as it has no effect in the caſe of donations;—in other words, if a perſon beſtow any thing in gift upon another, and afterwards retract the half, the gift ſtill remains valid with reſpect to the other half.—The reaſon for what is quoted from the *Mabſoot*, as above, is that, in the caſe there ſtated, the ſubject of the contract does not exiſt as before; and a ſubſequent circumſtance, as far as it has a tendency to annihilate the ſubject of the contract, operates equally as if it had exiſted from the beginning;—in the ſame manner as where a perſon (whether knowingly or unknowingly) marries within the prohibited degree.—It is otherwiſe with gifts; for the effect of gift is inveſtiture with right of property; and an undefined part of a thing is capable of being *property*. The reaſon, moreover, why ſeizin, in the caſe of a gift, is requiſite before the right of property can be acquired, is to prevent the poſſibility of compulſion; for if the grantee ſhould become proprietor of the gift immediately upon its being offered, and without taking poſſeſſion, the giver (who ought to act of his own accord) would then be conſtrained to do that to which he has not yet aſſented; namely, to deliver up the gift.

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* Arab, *Adil.* (See note, p. 195.)

It is not lawful to pledge fruit without the trees which bear it, crops without the land on which they are produced, or trees without the ground on which they ſtand; for as the pledge, in all theſe caſes, has a natural connexion with an article which is unpledged, it is therefore, in effect, indefinite, until ſuch time as it be ſeparated from that article.—In the ſame manner alſo, it is unlawful either to pawn a piece of ground without the trees which are produced upon it, a field without its produce, or a tree without its fruit; becauſe, in theſe caſes, a mortgage is induced of an article naturally conjoined with another which is not pledged. In ſhort, it is a rule that when a pledge is joined to ſomething not in pawn, the contract is not valid, ſince in ſuch caſe poſſeſſion cannot be taken of it. *Haneefa* has judged it lawful to pawn a piece of ground without its trees; for as the trees have no connexion with the ground, except in that part only from which they vegetate, they may therefore be excepted, together with the particular ſpot on which they ſtand. It is otherwiſe when a perſon pawns the court-yard of a houſe without the building itſelf; for then the part of the ground on which the building ſtands remains unpledged, whereas it is requiſite that the *whole* of the ground be pledged.

An article naturally conjoined to

It is lawful to pawn trees, together with the particular ſpots of ground on which they grow; for here ſubſiſts a *vicinity* only with the pawner's property, which is not repugnant to a contract of pawn.—If, in this caſe, there be fruit upon the trees, it is included in the contract; for as the fruit is an appendage of the tree, becauſe of the connexion between them, it is therefore included in the contract, in order that the ſame may be valid.—It is otherwiſe in the caſe of *ſale*, for as trees may be ſold without their fruit, unleſs that be expreſsly ſtipulated, it is not included in the ſale. It is alſo otherwiſe with

*Trees*, however, may be

[illegible] grow, without including the reſt of the reſpect to valuables depoſited in a houſe; for theſe not being appendages to the houſe are not included in the pledge, unleſs they be expreſsly ſtipulated. Grain, however, and herbs are conſidered as included, in caſe of their ground being pawned; but not in caſe of the *ſale* of it. Buildings, alſo, and trees, are included in the contract of pawn, when the ground or villages to which they belong are pledged.—A perſon may alſo lawfully pawn a houſe, together with whatever it contains.

A claim of [illegible] not an- the con- with re- to the [illegible]*vder.*

If another perſon prove his right to part of a pledge, and the remaining part be of ſuch a nature that it might with propriety be diſtinctly pawned, (as where another proves his right to the *court-yard* only of a pledged houſe, without the *building*,) the contract ſtill ſubſiſts with reſpect to the remaining part; in other words, if the reſidue be deſtroyed in the hands of the pawnee, his debt is divided between ſuch reſidue and the value of what had proved the right of another; and the proportion which the reſidue bears to the whole is ſtruck off from the debt, and that which the other part bears to the whole remains due from the pawner *. If, on the contrary, the reſidue be of ſuch a nature that it cannot be ſeparately pawned, (as where another proves a right to a pledged houſe without its court-yard,) the contract of pawn becomes abſolutely void; for it cannot operate upon any thing except what remains after deducting what has proved the right of another; and ſuch reſidue is incapable of being pawned.—It is to be obſerved that the continuance of the pawner, or of his goods, in the houſe which he has pledged are obſtructive of a regular delivery of the houſe;—in other words, if a perſon pledge or mortgage his houſe, and remain himſelf, or keep his goods therein, a delivery to the pawnee is not eſtabliſhed until he evacuate it, or withdraw his goods therefrom; whence, if it be deſtroyed in the interim, the pawnee is

Occupancy, ſo as to obſtruct a delivery of the pledge to the pawnee, prevents his becoming re[illegible]ble for it.

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* The mode of calculation, in this caſe, will be exhibited in a note in the laſt ſection of this book.

not anſwerable.—In the ſame manner, the continuance of any thing within a pledged veſſel is repugnant to the delivery of it; and ſo likewiſe the continuance of a burden on a pawned quadruped,—whence the contract is not complete until the burden be taken off, as the animal otherwiſe continues occupied. It is different where the *burden* is pawned and not the *animal*; for in this caſe the contract is valid, and the burden is pledged immediately upon the pawner delivering over the animal, it being occupied by the burden, not the burden by it; in the ſame manner as where things contained in a houſe or veſſel are pledged without that houſe or veſſel.—It is otherwiſe, however, where a perſon pawns a ſaddle or bridle upon a camel, and delivers the camel to the pawnee; for in that caſe the contract is not valid until the ſaddle or bridle be taken off the camel and delivered ſeparately to the pawnee; theſe being dependants of the camel, in the ſame manner as fruit is a dependant of the tree;—whence it is that (as lawyers have remarked) whenever a camel is pawned with a ſaddle or bridle on it, theſe are likewiſe included in the contract, although not particularly ſpecified.

Pledges cannot be taken for *truſts*;

IT is not lawful to take pledges for *truſts*, ſuch as depoſits, loans, or *Mozáribat*, or partnerſhip ſtock;—in other words, if a perſon commit his goods in truſt to another, taking a pledge for the ſame, it is invalid, as the receipt of the pledge would ſubject the receiver to reſponſibility; for if the pledge were deſtroyed in his hands, his claim would be extinguiſhed in a degree proportionate to the value.—In ſhort, it is requiſite that ſomething lie againſt the pawner of a nature to ſubject him to reſponſibility, in order that, oppoſed to it, the poſſeſſion of the pledge, in the event of its deſtruction, may ſubject the pawnee to reſponſibility, and operate as a diſcharge of his claim; but there is no reſponſibility with reſpect to *truſts*.

nor for

IT is not valid to take a pledge for articles which do not ſubject holder to reſponſibility,—ſuch, for inſtance, as an article ſold, and the *holder* of it;

and which ſtill remains in the hands of the ſeller; for if the purchaſer be deſirous of taking a pledge from the ſeller to anſwer the delivery, it is invalid, an article ſold not being inſured in the hands of the *ſeller*.— (Still, however, if the article ſold periſh in the ſeller's hands, his claim on the buyer for the price ceaſes; or, if he ſhould have previouſly received the price from the buyer, he muſt reſtore it.)—With reſpect, on the contrary, to articles which ſubject the holder to reſponſibility, (that is, thoſe for which, when deſtroyed, the holder is reſponſible,—for a *ſimilar*, if of the claſs of ſimilars;—or for the *value*, if of a different deſcription,—ſuch as *uſurped* property, the conſideration for *Khoola*, the dower to a wife, and the compoſition for wilful murder,) it is lawful to take pledges for them, as reſponſibility attaches to all ſuch matters, ſince if the article be extant the delivery of it is incumbent, or the value if it be deſtroyed. Oppoſing a pledge to ſuch articles, therefore, is taking a pawn in ſecurity for that which is itſelf a ſubject of reſponſibility, and is conſequently valid.

nor as a ſecu-

It is not lawful to take a pledge as a ſecurity againſt contingencies; —in other words, if a perſon ſell an article and receive the price, and the purchaſer, from an apprehenſion that the property might afterwards prove the right of another, and that he might thereby be rendered liable to a loſs, ſhould on that account demand a pledge from the merchant ſecuring him againſt ſuch a circumſtance, it is invalid; for it is an eſtabliſhed maxim that a pledge is to be taken as a ſecurity for the diſcharge of a claim *then extant*; and in the above caſe the claim does not exiſt, but is only what may poſſibly happen. If, therefore, a pledge be in ſuch a caſe taken, it is conſidered as taken in *truſt*, and not in *pawn*, and is in no reſpect ſubject to the laws of pledges. In a ſimilar manner, if a perſon depoſit any thing in pledge with another, in ſecurity for any thing which may *in future* be due from him, it is invalid.—It is, indeed, otherwiſe in the caſe of a *promiſed* debt;—as where a perſon gives a pledge to another on the ſtrength of his promiſing to lend him one thouſand *dirms*, and the other takes the pledge and promiſes to lend the money, and the pledge periſhes in his hands; for in this caſe he is reſponſible in proportion to the ſum promiſed, in the ſame manner as if it had been actually paid, the promiſe of debt being conſidered as an actual exiſtence of it, for this reaſon, that it was made at the earneſt deſire of the borrower.

Caſe of pawns in bar-

IF a perſon, having beſpoke goods of a merchant, pawn ſomething in ſecurity for the payment of the purchaſe-money, or having ſold ſilver to a banker, receive a pledge in ſecurity for the price, or if a merchant give a pledge to a perſon who has beſpoke goods from him, as a ſecurity for his delivery of them,—the contract is valid. *Ziffer* has ſaid that the contract, in theſe inſtances, is not valid, inaſmuch as the object of the pawn in ſuch caſes is that it may be a ſecurity for the diſcharge of the ſeveral claims, namely, the purchaſe-money of the goods beſpoken, the value of the ſilver ſold to the banker, or the goods beſpoken,—which is not allowable, becauſe an exchange is here induced of things not delivered for things of a different ſpecies; and an exchange of ſuch things, previous to ſeizin being obtained of them, is unlawful. The argument of our doctors is, that as a parity of ſpecies betwixt the things which were to be delivered, and the pledge, holds good with reſpect to their *worth*, by means of their worth the engagement may be fulfilled;—and the poſſeſſion of a pledge induces a reſponſibility in regard to its worth, although with reſpect to its ſubſtance it be conſidered merely as a *truſt*.—If, alſo, the pledge oppoſed to the price of the article beſpoke, or the value of the ſilver ſold, be deſtroyed at the time of making the contract, (that is, before the company in whoſe preſence it was made breaks up,) the bargain is accompliſhed, and the pawnee or ſeller is reckoned to have received his right; becauſe by the deſtruction of the pawn he is virtually conſidered to have received the price of his ſilver, or the amount of money which was to have been advanced.—If, on the contrary, the buyer and ſeller ſhould have ſeparated previous to the deſtruction of the pledge, the bargain becomes invalid; becauſe the receipt of the price of the ſilver, or the advance of money for the goods at the time of making the bargain, (which is a condition,) is not here eſtabliſhed either in reality or in the conſtruction of law.—If, moreover, a pledge taken in ſecurity for the delivery of the goods beſpoken be deſtroyed, the bargain is completed, and the pawnee (who advanced the money) is held to have received the goods which he beſpoke.

In the diſſolution of a contract of *Sillim*, the pledge remains as a ſecurity for the advanced capital;

If the parties to a contract of *Sillim* diſſolve the bargain in a caſe where a pledge has been given for the delivery of the goods, it ſtill remains as a ſecurity for the refunding of the money which had been advanced, as *that* then ſtands in lieu of the *goods*;—in the ſame manner as where goods are uſurped, and, the *Kazee* having ordered their reſtoration, a pledge is given for that purpoſe, and afterwards the goods are deſtroyed,—in which caſe the pledge remains a ſecurity for the *value* of the go

and if it be loſt in the advancer's hands, his claim of reſtitution is annulled.

If, in the above inſtance, the pledge be loſt after the parties had agreed to annul the bargain of *Sillim*, the beſpoken article is in that caſe conſidered as *delivered*, and the purchaſer [the advancer] has no further claim.—It is, however, incumbent on him to give to the ſeller as much grain as he ſhould have received from him, in order to his recovering the money he had advanced,—in the ſame manner as where a perſon, having ſold a ſlave and delivered him to the purchaſer, takes a pledge in ſurety for the price,—and they afterwards mutually conſent to annul the bargain,—in which caſe the ſeller is entitled to retain poſſeſſion of the pledge as a ſecurity for the reſtoration of the ſlave; and if the pledge be deſtroyed in his hands, he is conſidered to have received the purchaſe-money; and it is incumbent on him to pay the ſum of the purchaſe-money to the buyer, and thereby recover his ſlave.

It is not lawful to pawn either a freedman, a *Modabbir*, a *Mokâtib*, or an *Am-Walid*; becauſe the end of a contract of pawn is to eſtabliſh the pawnee's poſſeſſion of the pledge, with a view to obtaining payment of his claim; a view which cannot be accompliſhed in any of the above-mentioned inſtances, as a freedman is not property, and the ſale of the others is contrary to law.

A fr a A A cannot be pawned.

If a perſon agree to be bail for the appearance of another, it is not allowable to demand a pledge from him on this account.—In the ſame manner alſo, it is not lawful to take a pledge as a ſecurity for a criminal condemned to ſuffer retaliation either in life or limb, as in ſuch caſe the right could not be obtained by means of the pledge. It is otherwiſe in the caſe of offences by *miſadventure*; for there the fine may be diſcharged by means of the pledge.

Pledges cannot be taken to ſecure the appr a *fur* or of

It is not lawful to take a pledge oppoſed to a right of *Shaffa*:—in other words, if a perſon appeal to the *Kázee*, (for inſtance,) and claim his privilege of *Shaffa*, and obtain from him a decree to that effect, and demand of the purchaſer a pledge for the houſe over which his privilege of *Shaffa* extends, the pawn is not valid; for here the article is not inſured in the hands of the purchaſer; (that is to ſay, if the houſe ſuffer any damage in the poſſeſſion of the purchaſer, he is not reſponſible for it;) and a pledge cannot be taken but for matters that induce reſponſibility.

or in ſecurity for a right of *Shaffa*;

It is not permitted to take a pledge oppoſed either to a ſlave guilty of a crime, or to the *debt* of a ſlave; becauſe the maſter is not in either inſtance reſponſible, ſince, in caſe of the death of the ſlave, he is not obliged to diſcharge his debts.

or for a criminal *ſlave*, or the *debts* of a ſlave;

or for the

It is not lawful to give a pledge for the wages either of a mourner* or of a ſinger. If, therefore, a pawn be given in ſuch caſe, and be afterwards deſtroyed in the hands of the pawnee, he is not reſponſible for it, as the thing in ſecurity for which it was pledged is not a ſubject of reſponſibility.

A *Muſſulman* cannot give or take *wine* in pawn: but if he ſo receive wine from a *Zimmee*, and it be he le

It is unlawful for a *Muſſulman* either to give or take wine in pawn, whether from a *Muſſulman* or a *Zimmee*. Notwithſtanding this, however, if the *Zimmee* be the pawner and the *Muſſulman* the pawnee, and the wine be loſt or ſpoiled, the *Muſſulman* is accountable for it, in the ſame manner as in the caſe of his having *uſurped* it: whereas, if the *Muſſulman* were the pawner and the *Zimmee* the pawnee, and the wine be loſt in the hands of the latter, he would not owe any compenſation to the *Muſſulman*, any more than a perſon who had *uſurped* wine from a *Muſſulman*. It is otherwiſe where the pawner and pawnee are both *Zimmees*; for wine is property with them. Carrion, on the contrary, is not property with them any more than with *Muſſulmans*; and accordingly a pawn of carrion is not valid among them any more than with us.

A pawnee is ſtill reſponſible for the pledge, although it ap- that the to which s op- is not

If a perſon purchaſe vinegar, a ſlave, or a ſlaughtered goat, and, having given a pledge for the purchaſe-money, afterwards diſcover the vinegar to be wine, the ſlave to be a freeman, or the goat to be carrion†, ſtill the ſeller is reſponſible for the pawn in caſe of its being loſt or deſtroyed; for it was depoſited in oppoſition to a debt to all appearance due. The ſame rule alſo holds in a caſe where a perſon, having killed a [ſuppoſed] ſlave and given a pledge for the payment of his value, afterwards diſcovers that he was a freeman. So, likewiſe, where the parties in a ſuit compromiſe the buſineſs for a part of the plaintiff's demand, and the defendant depoſits a pledge to anſwer the ſame, and they afterwards agree that nothing was owing from the defendant, the pledge is inſured in the hands of the holder of it.

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* Meaning, a perſon employed, on occaſions of grief, in making lamentations.—It is a cuſtom amongſt the *Muſſulmans* to employ ſuch perſons, although prohibited by the LAW,—whence it is that they cannot legally ſue for their hire.

† As having died a natural death.—The term *carrion* is applied to the fleſh of all animals not ſlain according to the preſcribed form.

A father or guardi pledge the ſlave of his infant ward for a debt owing by himſelf;

(but they are accountable in caſe of loſs;)

and they may alſo authorize the pawnee to *ſell* the ſlave.

It is lawful for a father to pledge, in ſecurity of his own debt, the ſlave of his infant child; for a father has the privilege of depoſiting the goods of his infant child in truſt; and to pledge them is ſtill more conducive to the intereſt of the proprietor than to place them in truſt, ſince if a pledge be loſt it muſt be accounted for, whereas a truſtee is not reſponſible for the depoſit in his hands. A guardian alſo is the ſame as a father in this particular, becauſe ſuch an authority veſted in him is beneficial to the child. *Aboo Yooſaf* and *Ziffer* maintain that this is not lawful either to the father or guardian; (and ſuch is what analogy would ſuggeſt;) for a pledge is, in effect, equivalent to a *payment*; and as a father is not privileged to pay off his debts with the goods of his child, it follows that he has no power of giving them in pledge.—To this, however, it may be replied, that there is an obvious difference between the act of *pledging* and that of *payment*; for diſcharging the debts by means of the child's property is a deſtruction of his right without any equivalent; whereas, placing his property in pledge is providing it a guardian, for the interim, without in any degree affecting his right. As, therefore, the contract of pawn is valid in this inſtance, it follows that in caſe of the pledge being deſtroyed in the pawnee's hands, he is conſidered to have received payment of his debt, and that the father or guardian are reſponſible to the infant, as having diſcharged their debt by means of his property.—In like manner it is lawful for a father or guardian to order the pawnee to ſell the pledge; for both of theſe have the privilege of ſelling the goods of their infant ward. The learned have ſaid, that this is founded on the law in a caſe of *ſale*; for where a father or guardian gives the goods of his ward to his own creditors, in payment of his debt, it is lawful;

and a commutation being thus made of the debt for the price, the father or guardian, in the opinion of *Haneefa* and *Mohammed*, become anſwerable to the ward for the value.—According to *Aboo Yooſaf*, on the contrary, a commutation does not take place;—and the ſame difference of opinion obtains where an agent for ſale diſpoſes of the goods of his conſtituent to a perſon to whom he is indebted. The contract of pawn, however, is in theſe inſtances ſimilar to that of ſale with reſpect to its effects; for in both the object is to diſcharge the debts of the father or guardian with the goods of the infant, and to become anſwerable for them.

A father may
infant child in pledge for a debt owing from the infant to himſelf, or to *another* infant child, or to his own mer- ſlave:

If a father pawn the goods of his infant child into his own hands r a debt due from the child, or into the hands of another of his children being an infant, or of his ſlave, being a merchant and not in debt, it is lawful; becauſe a father, on account of the tender affection which he is naturally ſuppoſed to have for his child, is conſidered in a double capacity, and his bare inclination as equivalent to the aſſent of both parties; in the ſame manner as where a father ſells the property of his infant child to himſelf.

but a *guar-* has not privi- ;

It is not lawful for a guardian to pledge into his own hands goods belonging to his ward on account of a debt due to him, or into the hands of his child being an infant, or into the hands of his ſlave being a merchant and free from debt; (nor is it permitted to him to give any thing of his own in pawn into the hands of an orphan for a debt owing to the orphan from himſelf;) for a guardian, being merely an agent, cannot of courſe have a double capacity in contracts. A guardian, moreover, is more deficient in tenderneſs than a father, and therefore cannot, like a father, ſtand in a double capacity in making contracts. Beſides, a guardian pawning the property of his ward into the hands of his infant child, or his ſlave, being a merchant and free from debt, is in effect the ſame as pawning it to *himſelf*.—It is otherwiſe where a guardian pawns the property of his ward to his *adult* ſon, to his father, or to his indebted ſlave, ſince over theſe he has no authority.)

If a guardian purchaſe victuals or apparel for the uſe of his ward, and, having debited him for the price, take in pawn part of his goods as a ſecurity for the debt, it is valid; for, as he is permitted to borrow for the uſe of the orphan, and as taking a pawn is like the diſcharge of a claim, it is of conſequence legal. Beſides, as it is lawful for a guardian to trade on account of his ward, it follows that it is alſo lawful for him to give and receive pawns, they being ſimilar to receipts and payments.

yet he alſo may retain the goods in pawn for *neceſſaries* furniſhed by him.

If a father pawn the goods of his infant ſon, and the infant attain maturity, ſtill he is not at liberty to annul the contract of pawn and take back the pledge until he ſhall have diſcharged the debt; for the contract is binding upon him; as the act of a father on behalf of his infant child is binding upon the child after he ſhall have attained maturity, a father being his infant child's ſubſtitute.

A child cannot recover property which had been pawned by his deceaſed father, but by *redeeming* it.

If a father pawn the goods of his ſon on account of his own debt, and the ſon, by a diſcharge of the debt, redeem the ſame, he has a claim on the father for the ſum; for it was neceſſary that the ſon ſhould diſcharge the debt, having occaſion to releaſe his goods out of the hands of the pawnee;—in the ſame manner as holds with reſpect to the lender of a pledge; in other words, if a perſon lend any thing to another with a view to that other's pawning it, it is lawful to him to redeem the article from the pawnee by a diſcharge of the borrower's debt, and then to prefer a claim of debt againſt the borrower; and ſo here likewiſe.—If, alſo, in this caſe, the pawn be loſt or deſtroyed before the ſon's releaſe of it by diſcharging his father's debt, it is lawful for him to prefer a claim upon the father, as he has in effect diſcharged his debt by means of his [the ſon's] property.

If [illegible] [illegible]ing the [illegible] life-time he has a claim on him for what he pays;

and the father is reſponſible in caſe of pledge being loſt.

It is lawful for a father to pawn the goods of his ſon for a debt jointly due by both. If, therefore, the pledge be deſtroyed, the father muſt compenſate to the ſon by the payment of a ſum equivalent to his [the father's] ſhare of the debt; becauſe he has paid off ſo much by means of the ſon's property.—The ſame rule alſo holds with a grandfather, or a guardian, in caſe of the non-exiſtence of the father.

Caſe of a guardian pawning the goods of his orphan ward, and then borrowing and ing the dge.

If a guardian purchaſe victuals for an orphan, ſo as that the price is a debt upon the orphan, and pawn an article belonging to the orphan as a ſecurity for the debt, and the pawnee take poſſeſſion of the ſame, and the guardian then borrow it from the pawnee for the uſe of the orphan, and it be deſtroyed in his [the guardian's] hands, it is no longer included in the contract of pawn, nor is any perſon reſponſible for it; for the act of the guardian in this inſtance is the ſame as that of the orphan when he has attained maturity, he having borrowed the article for his uſe,—in which caſe ſuch is the rule. The debt of the orphan, in this caſe, ſtill remains due; and the creditor is to receive payment from the guardian, who is reimburſed by the orphan; becauſe the guardian, in borrowing the pledge, was not guilty of any tranſgreſſion, as it was borrowed for the orphan's uſe. If, on the contrary, it have been borrowed on his own account, he is reſponſible for it to the orphan; becauſe in borrowing it for his own uſe he is guilty of a tranſgreſſion, as having uſurped a privilege which does not belong to him. If, alſo, he were to uſurp it from the pawnee and apply it to his own uſe, he is reſponſible for the value, as having been guilty of a tranſgreſſion,—with reſpect to the pawnee, by the uſurpation,—and with reſpect to the orphan, in having applied the article to his own uſe. He is, moreover, in this inſtance bound to diſcharge the debt of the pawnee, if the term ſtipulated ſhould have expired. If, therefore, the value of the pawn be equivalent to the debt, he muſt diſcharge it in full, without any reimburſement from the property of the orphan; for the ſame that was before due from the orphan to him becomes now ſo from him to the orphan, and hence a commutation takes place. If, on the other hand, the value of the pledge be *ſhort* of the debt, he muſt diſcharge from his own property a ſum equivalent to the pledge, and the reſidue from that of the orphan; for he is only liable for the amount of the value of the pledge. If, on the contrary, the value of the pledge *exceed* the debt, he muſt pay the amount of the debt to the pawnee in diſcharge of his claim, and the remainder is the right of the orphan. If the ſtipulated term of payment ſhould not have expired, the value of the pledge muſt be depoſited in pawn with the pawnee; for the guardian having deſtroyed one of the eſtabliſhed rights of the pawnee, the value of it therefore muſt be given in pledge into his hands;—and upon the term of payment arriving, the ſame rules are to be obſerved as are above fully ſet forth.—It is to be obſerved, however, that the guardian, in caſe of having extorted the pawn and applied it to the uſe of the orphan, becomes (if under theſe circumſtances it ſhould be deſtroyed) liable only to make reparation for violating the rights of the pawnee, as in applying it to the uſe of the orphan he does not violate his right; neither is his taking it from the pawnee any tranſgreſſion with reſpect to the orphan, as a guardian is authorized to take the goods of his ward;—whence it is that *Mohammed*, in the *Zeeadát*, (under the head of *Acknowledgments*,) has ſaid, "Where a father or guardian acknowledges "having uſurped the goods of his infant ward, nothing is chargeable "to them in caſe of loſs or decay; becauſe this is not an uſurpation, "they having an unlimited power to take the goods of their ward." In the above caſe, therefore, the guardian is anſwerable to the pawnee; and at the expiration of the ſtipulated term he muſt diſcharge his debt and charge it to the account of the orphan; for he has in no reſpect prejudiced him, but has on the contrary applied the pawn to his uſe. If, however, the term of payment be not arrived, the thing given in reparation muſt, until then, remain as a pledge in the hands of the pawnee, when he is to obtain payment of his debt, and the guardian to recover the amount from the orphan's property.

*Money*, and all *weighable* and *meaſureable* articles may be pawned,—Rules to be obſerved in thoſe in-

It is lawful to pawn *dirms*, *deenars*, or any article of weight or meaſurement of capacity; for as a debt may be diſcharged by means of ſuch articles, they are conſequently fit to be pawned. If, therefore, any ſuch articles be pawned in ſecurity for an article of the ſame kind or ſpecies, and be loſt in the pawnee's hands, the debt becomes cleared in a degree proportionate to the value of the pledge, if that be either equal to, or leſs than the amount of the debt. If, on the contrary, the value of the pledge exceed the amount of the debt, the whole of the debt is in that caſe held to be diſcharged, notwithſtanding the one be baſe and the other pure; for where the pawn and debt are of the ſame kind, the quality is not to be conſidered. This is the opinion of *Haneefa*; for (according to him) the pawnee in the above caſe is to receive payment of his debt by weight, and not by value.—The two diſciples, on the contrary, hold that the pawnee, on the loſs of the pledge, becomes reſponſible for its value in ſome thing of a different ſpecies, which value he holds (as it were) in pawn in lieu of the original pledge *. The argument of *Haneefa* is, that any regard to quality drops in the caſe of uſurious property† when oppoſed to its own ſpecies.—A diſcharge in a *pure* article of this nature, moreover, in return for a *baſe* article, is lawful,—as where, for inſtance, a debtor, through inattention, repays a debt of baſe money in pure money.

Caſe of a ſilver veſſel pawned,—and afterwards loſt,

If a ſilver veſſel equiponderant to ten *dirms* be pawned for a debt of ten *dirms*, and afterwards loſt in the hands of the *pawnee*, the whole amount of the debt ſtands diſcharged. The compiler of the *Hedâya* remarks that this rule univerſally obtains with our doctors where the or broken.

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* Here follows a caſe in point, quoted from the *Jama Sagheer*, with the author's remarks, and the difference of opinion among the *Muſſulman* doctors concerning it, which is omitted by the tranſlator, as it interrupts the diſcuſſion of the point in queſtion, and the arguments adduced have been before fully detailed under the head of *Uſury*.

† Arab. *Imwâl Rabwee*; meaning any ſort of grain,—and alſo gold or ſilver;—in ſhort, every thing with reſpect to which uſury can be conceived poſſible.

of the veſſel is either equal to, or greater than the *weight* of it: but that where the *value*, by being ſhort of the *weight*, is ſhort of the debt, there is a difference of opinion; for, according to *Haneefa*, the *whole debt*, in that caſe, ſtands diſcharged, (he holding that the pawnee to have received payment by the *weight* of the veſſel;)—whereas the two diſciples teach that the pawnee remains reſponſible for the value, which continues with him (as it were) in pawn, his claim ſtill exiſting as before. If, on the contrary, the veſſel be not *loſt*, but *broken*, then, on the firſt ſuppoſition, (that is, ſuppoſing the weight and value to be the ſame,) according to *Haneefa* and *Aboo Yooſaf* the pawner is not compellable to redeem it; for if he were to redeem it by paying the greateſt part of his debt, and deducting ſome ſmall part of it in conſideration of the loſs ariſing from the breakage, it would in that caſe appear that he conſider the quality ſeparately, and on this account paid only *part* of his debt, which is illegal; or if, on the other hand, he were to redeem it by paying the *whole* of his debt, and thus taking the broken veſſel, it would be a loſs to him.—The pawner, therefore, (according to the two *Elders*,) is at his own option, either to redeem the broken veſſel by paying the whole of his debt, or to relinquiſh it and compound with the pawnee for its value, which may either be of the ſame or of a different ſpecies from the veſſel; and this value remaining (as it were) in pawn, the pawnee becomes proprietor of the veſſel, becauſe of his having thus made compenſation for it. In the opinion of *Mohammed*, on the contrary, the pawner may either redeem the broken veſſel by a payment of the whole of the debt, or he may give it to the pawnee as a diſcharge of it, in the ſame manner as in the caſe of the *loſs* of the pawn. Hence *Mohammed* conceives an analogy between a pawn *damaged* and a pawn *loſt*, for this reaſon, that when a redemption cannot be made without a compenſation, it is then the ſame as if the pawn were loſt; and as, when the pawn is actually loſt, the debt becomes (in the opinion of all our doctors) annulled, it is ſo likewiſe in the preſent inſtance, which is a caſe of loſs *in effect*.—*Haneefa* and *Aboo Yooſaf* have ſaid, that when a pawn is loſt the pawnee is held to be paid in reſpect of the *worth*,—in this manner, that he becomes immediately anſwerable for the value of the pawn to compenſate for its loſs, and that a *commutation* for the debt takes place.—But when a debt is annulled for a pawn then extant, though ſomewhat damaged, an abſolute appropriation of *it takes place; that is to ſay, it muſt be ſo detained as to render the ſubſtance of it the property of the pawnee.* This is, however, a miſtaken determination, and is rejected in law; wherefore it is moſt proper that a ſubſtitute be made of the *value* *.

A pledge may be ſtipulated, in ſale, for the price of the article ſold:

If a perſon ſell a ſlave on condition that the purchaſer ſhall deliver to him in pawn ſome ſpecified thing, it is lawful on a favourable conſtruction, whereas analogy would ſuggeſt that it is unlawful. So alſo, it is lawful for a perſon to ſell a ſlave, on condition that the purchaſer give, as his ſecurity, a third perſon who is preſent at the concluſion of the bargain, and who conſents to be ſecurity. The objection ſuggeſted by analogy, in this inſtance, is that the agreement entered into forms a double compact, or one compact within another, which is prohibited in the LAW.—Beſides, it contains a condition which is not conformable to the object of the agreement, and from which there reſults an advantage to the ſeller, who is a party in both the compacts; and ſuch a condition renders a contract of ſale void. The reaſon, however, for a more favourable conſtruction of the law, in this particular, is that ſuch a condition in the agreement is no way repugnant to the contract, ſince bail or pawn tend to enſure and ſtrengthen the agreement, and are in ſtrict conformity with the obligation of the price. If, therefore, the propoſed ſurety be preſent at the concluſion of the agreement, or the pledge be ſpecified, attention is paid to the condition of bail or pawn; for, as being proper to the agreement,

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* A long diſcuſſion which follows upon this ſubject is omitted by the tranſlator, as containing merely a train of ſubtle and frivolous diſtinctions relative to *uſury*, of no practical utility.

they

but the agreement is not valid unleſs the pledge be particularly ſpecified;

nor can the purchaſer be compelled to deliver it.

they are conſequently legal. If, on the other hand, the ſurety be not preſent, nor the pledge ſpecified, the agreement is invalid; for the intention of giving bail or pawn do not in that caſe exiſt, inaſmuch as the pledge or ſurety are unknown; and as there remains only a nugatory condition, the agreement is therefore invalid. Still, however, if the propoſed ſurety appear before the parties have ſeparated, and acquieſce in the bail, the agreement then becomes valid.—If the purchaſer, after the pawn had been agreed upon, ſhould refuſe to deliver the pledge ſpecified, the *Kázee* muſt not compel him thereunto, as it is the delivery alone that determines the agreement.—*Ziffer* has ſaid, that when the condition of pawn is included in the ſale, a fulfilment of it is abſolutely neceſſary; and that therefore the *Kázee* may enforce it; for the condition having been ſtipulated as an article of the ſale, becomes one of the rights thereof, and is equally binding, although it be not in itſelf of any force;—in the ſame manner as a power of agency included in a contract of pawn, which is binding becauſe of the *contract* being ſo; in other words, if the pawner of a thing were to ſtipulate that the pawnee ſhall undertake the ſale of it, ſuch agency would be binding;—whence it would not afterwards be in the power of the pawner to retract it. In reply to this, however, it is to be obſerved, that the agreement of pawn is *voluntary* on the part of the pawner; and there is no compulſion to the execution of a voluntary deed. The ſeller, however, may, at his diſcretion, either relinquiſh the agreement of pawn, or he may invalidate the ſale; for as he had earneſtly deſired the detention of the pawn, and as it was on the ſtrength of that condition only that he had agreed to the ſale, he is not, conſequently, in default of it, obliged to adhere to his agreement, unleſs the buyer ſhould in the mean time either have paid the price, or pawned, in place of the thing ſpecified, the worth of it in *dirms* or *deenars*, in which caſe the ſale becomes complete and binding, ſince, in the firſt inſtance, the ſeller obtains his object, and in the ſecond he obtains the fulfilment of a condition with which he was ſatisfied, the pawn of the *value* being the ſame as that of the *ſubſtance*, for the end of the agreement is *to obtain payment*, and that can only be obtained by means of the product of the pledge, namely, the *value*.

An article

the price of the merchandize is conſidered as a pledge, although the term *pawn* be not expreſsly mentioned by him.

If a perſon purchaſe any thing for a particular ſum, and requeſt of the ſeller "to keep his robe until ſuch time as he pays him the purchaſe-money," the robe is conſidered as a pledge; for the buyer, in ſaying that the ſeller ſhould detain the robe until he render him the purchaſe-money, ſpoke in a manner which implied an intention of pawn, although he did not expreſsly mention the word *pawn*: and in every agreement regard is to be had to the *ſpirit*, not to the *letter*. *Ziffer* maintains that, in this caſe, the robe is not pawned; in which opinion *Aboo Yooſaf* likewiſe concurs; and the reaſon they allege is, that the expreſſion uſed by the buyer does not only imply an intention to *pawn*, but may likewiſe ſignify a *depoſit*, which conſtruction, as being the moſt favourable, ought to be adopted.—It is otherwiſe where a perſon expreſſes himſelf, "keep this robe in ſecurity of your debt (or goods,)" for then, in mentioning *ſecurity*, it becomes obvious that his object was to *pawn* it.—In anſwer to this, however, it is to be obſerved, that in either caſe his intention was to *pawn* the robe; for although the expreſſion, "*keep* this robe," may admit of the interpretation either of *pawn* or *depoſit*, yet when the ſpeaker ſubjoins, "until ſuch time as I pay you the purchaſe-money," it is no longer doubtful that he means to *pawn*, and not to *depoſit* it.

## SECTION.

Where two (or more) articles are oppoſed in pledge to one debt, they be

IF a perſon pawn two ſlaves for a debt of one thouſand *dirms*, and afterwards pay the proportion of *one* of theſe ſlaves, ſtill he is not permitted to take back that ſlave until ſuch time as he render to the pawnee the reſidue of the debt. (By the *proportion* of the ſlaves is to be underſtood the particular ſum for which each is pawned, when they are both oppoſed to the amount of the debt.) The argument in ſupport of this determination is, that as a pawn is detained in behalf of the whole debt, it is therefore detained in behalf of every part of it, in order the more ſtrongly to bind the pawner to the payment of his debt; in the ſame manner as holds with reſpect to an article ſold, where, if the ſeller, having paid part of the purchaſe-money, be deſirous of taking in lieu thereof a proportionate part of the article, it is not allowed: on the contrary, he muſt wait until the payment of the whole price be made, when he may take the whole of the goods purchaſed. The ſame rule alſo holds, according to the *Mabſoot*, when the depoſitor previouſly ſpecifies the particular value of each of the component parts of his pledge; as, for inſtance, when a perſon, having pledged two ſlaves againſt a debt of one thouſand *dirms*, declares the value of each to be five hundred *dirms*. It is related in the *adàt*, on the contrary, that in this caſe the pawner is permitted to take back the ſlave upon paying to the pawnee the ſum which he had before ſpecified to be his value. The argument of the *Mabſoot* is that, in the caſe in queſtion, there is only one agreement; and that no ſeparation takes place in it on account of the diſtinct ſpecification;—in the ſame manner as in *ſale*; in other words, if a perſon ſell two ſlaves for one thouſand *dirms*, and particularly mention the price of each to

notwith-

poſed to a particular part of the debt.

be five hundred *dirms*, ſtill there are not two diſtinct bargains; and ſo likewiſe in the preſent inſtance. The argument of the *Zeeadât* is that in the above caſe there ſubſiſts two agreements; and that it is unneceſſary to conſider them as one; for, if they be conſidered as two, it amounts merely to this, that it would follow that the one is a condition of the other, a concluſion which does not invalidate the agreement, but rather the condition itſelf is invalid,—(whence it is that if the pawnee acquieſce in the agreement reſpecting only *one* of the two ſlaves, it is lawful.) It is otherwiſe in the caſe of *ſale*; for if there be *two* contracts of ſale, it leads to this, that the one is a condition of the other; a concluſion which would invalidate the ſale altogether.

An article pawned to two perſons (in ſecurity of a debt jointly owing
is
*in*

If a perſon pawn any ſpecific article into the hands of two people, in ſecurity of a debt which he jointly owes to both, it is lawful;—and in this caſe the article is held to be completely pledged into the hands of each of the creditors; becauſe the ſpirit of the agreement is, that the article is held entire and in one pledge:—nor does it hence follow that the pledge is *undefined*, becauſe of the ſeparateneſs of rights; for each has a claim to the whole,—the object of the agreement being *a detention in ſecurity of debt*; and as that is a thing incapable of ſeveralty, the pawn is therefore detained wholly in ſecurity of the debt of each. It is otherwiſe where a perſon beſtows any thing in gift to two people; for this is not lawful, according to *Haneefa*, as the object of a gift is *an endowment with right of property*, and two men cannot lawfully have each the complete property of one thing, ſince this would induce the conſequence of a moiety being appropriated to each indefinitely, which in gifts is not admiſſible.—If, in this caſe, the parties agree to a *Mahâyat*, or alternate poſſeſſion of the pledge, each is, during his term of poſſeſſion, a truſtee on behalf of the other;—and if it be deſtroyed, each is reſponſible according to his reſpective ſhare,—for upon this happening each is held to have received a diſcharge

and if they agree to hold it alternately, each is in his turn *truſtee* on behalf of the other.

a diſcharge of his claim, a diſcharge being capable of partition. If, alſo, the pawner pay off the debt of either, the article in that caſe remains wholly in pledge with the other, ſince it was before completely ſo in the hands of each without any ſeparation. Analogous to this is the detention of things which have been ſold to two or more jointly; for one of the buyers, after paying his proportion of the price, is not entitled to take from the merchant his ſhare of the goods purchaſed: on the contrary, the merchant may detain the whole until ſuch time as he ſhall have received the remaining part of the price from the other purchaſer.

If two people, by one agreement, pawn a certain thing into the hands of one perſon in ſecurity of a debt which they jointly owe to him, it is lawful, and the thing ſo pledged is detained in ſecurity of the whole of the debt. The pawnee is, moreover, at liberty to detain the pledge until he receive a complete diſcharge; for the two having pawned the article *together*, the pawnee is therefore held to have received a complete and undivided ſeizin of it.

If two perſons, reſpectively, claim an article from a third, in virtue of an alleged pawn, and both produce evidence, the claim of both is null.

If two perſons prefer a claim to a ſlave in the poſſeſſion of a third, each ſeparately aſſerting "that the poſſeſſor had formerly completely "pawned the ſlave into his hands, and had afterwards borrowed or "uſurped him," and each produce an evidence in ſupport of his declaration, the claims and evidences are null and inadmiſſible; for each of the claimants having maintained and ſupported by evidence that the poſſeſſor had pawned the ſlave completely into his hands alone, it is not, therefore, in the power of the *Kázee* to decree him to either, as it is impoſſible that the ſame ſlave ſhould be pawned wholly into the hands of one perſon, and at the ſame time wholly into the hands of another:—neither could he decree wholly the *ſubſtance* of the pawn to any one of them; ſince he has no reaſon to prefer one to the other; nor could he decree each of them an half, as a pawn is indiviſible. As, therefore, it is impoſſible to decide according to the evidences of either, they are both ſet aſide.

OBJECTION.—It would appear that the *Kâzee* ought to decree the ſlave to be the pledge of both, ſince they have both, as it were, received him at the ſame time, the period when he was pledged not being aſcertained.

REPLY.—The *Kázee* has no power to paſs a decree of that nature, as he would thereby depart from the evidence adduced by the parties, each having expreſsly declared, that the ſlave was wholly pawned into his hands towards obtaining a ſatisfaction for the whole of his particular claim. If, on the other hand, he were to decree an *half* to each, he would act in oppoſition to the evidence, which a *Kâzee* is not at liberty to do.

If a pawner die, leaving an article in pledge with two pawnees, it is ſold for the diſcharge of their claims.

IF a pawner die, leaving a pledged ſlave (for inſtance) in the hands of two pawnees, and each of them produce evidence to prove that the ſlave had been pledged wholly to *him*, a moiety of the ſlave is in that caſe awarded in pledge to each, and may reſpectively be ſold by them in ſatisfaction of their claims, upon a favourable conſtruction; and ſuch is the opinion of *Haneefa* and *Mohammed*.—Analogy would ſuggeſt that the pawn is in this inſtance null; (and ſuch is the opinion of *Aboo Yooſaf*;) for as the intendment of a contract of pawn is that the pledge ſhall be detained towards obtaining payment of a claim, it follows that the decree of the *Kázee*, awarding a moiety of the ſlave to each, proves the pawn to have been indefinitely held in ſeveralty, which is unlawful now, in the ſame manner as in the lifetime of the pawner.—The reaſon, however, for a more favourable conſtruction of the law in this particular is, that the object is not the mere *contract itſelf*, but its *utility*. Now the utility of the agreement in the lifetime of the pawner conſiſts in a detention of the pledge, which cannot be accompliſhed in the caſe of an indefinite ſeveralty of claim; but the utility of it after his death is, that the pawnee may ſell it in order to diſcharge his debt, which a ſeveralty of claims does not prevent,—the caſe being the ſame as where two men contend that they are married to the ſame woman,—or where two ſiſters contend that they are married to the ſame man, and evidences are produced to prove it by both;—for in this caſe the evidence adduced is diſregarded during the lifetime of the man; but after his death a decree is paſſed aſſigning them their reſpective ſhares of inheritance, as that is capable of diviſion.

## CHAP. III.

## Of Pledges placed in the Hands of a Truſtee *.

The parties may, by agreement, entruſt the pledge to the cuſtody of any upright perſon;

If the pawner and pawnee agree to place the pledge in the hands of any upright perſon, (to act as truſtee for both,) it is lawful. *Mâlik* is of opinion that this is not lawful; becauſe the ſeizin of the truſtee is the ſame as that of the pawner; (whence it is that the truſtee has recourſe to him for indemnification where the pawn is loſt in his poſſeſſion, and another, having proved a right to it, takes a compenſation from him for its loſs;) and ſuch being the caſe, no account is made of the ſeizin of the pawnee; wherefore the contract of pawn is incomplete, becauſe of the failure of one of its conditions, namely, the ſeizin of the *pawnee*. The argument of our doctors is that the ſeizin of the truſtee is apparently the ſame as that of the *pawner*, with reſpect to *preſervation*, (the *ſubſtance* of the pawn being a *truſt*,) and with reſpect to *worth* it is the ſame as that of the pawnee, as it ſubjects him to reſponſibility in caſe of its loſs, a pawn being inſured with regard to its worth; wherefore the truſtee ſtands in the place of two parties, the pawner and the pawnee, to ſtrengthen the object of both, namely, the contract of pawn. (With reſpect to the truſtee's right of having recourſe to the pawner, in caſe of the *loſs*, and ſo forth, as mentioned above, it is admitted ſolely in conſideration of his being the pawner's deputy for the conſervation of the ſubſtance of the pledge, in the manner of any ordinary truſtee.)

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* Arab. *Adil*, an *upright* perſon. (See note in p. 195.)

after which neither of them is at liberty to take it out of the truſtee's hands:

THE pawnee is not at liberty to take the pledge from the truſtee, inaſmuch as the right of the pawner is ſtill connected with it, in this way, that the pledge is a depoſit in the truſtee's hands. Neither is the pawner at liberty to take it, becauſe of the pawnee's right being connected with it for the purpoſe of obtaining payment of his debt. Neither party, therefore, is at liberty to invalidate the right of the other.

but the pawnee is reſponſible in loſs,

the truſtee have tranſgreſſed, in which caſe *he* is reſpon-

IF the pledge be deſtroyed in the poſſeſſion of the truſtee, the pawnee is reſponſible; for the ſeizin of the truſtee is the ſame as that of the pawnee in regard to the worth of the pledge; and reſponſibility attaches only on account of worth. If, on the contrary, the truſtee deliver the pawn either to the pawner or pawnee, he is reſponſible; for this reaſon, that he is the *pawner*'s truſtee with reſpect to the *ſubſtance* of the pledge, and the *pawnee*'s truſtee with reſpect to its *worth*; and each of theſe parties ſtands as a *ſtranger* towards the other; and a truſtee is rendered reſponſible by delivering the object of his truſt into the hands of a ſtranger. The truſtee, therefore, being in this caſe reſponſible, cannot retain the value by way of the pawn in his own poſſeſſion; for as he has become indebted for the value, it follows that, if he were to retain it by way of the pawn, he becomes at once the claimant and claimee, and the payer and receiver; in which

Rules to be

which is implied an obvious inconſiſtency. The pawner and pawnee muſt therefore, in this caſe, concur to take the value from the truſtee, and deliver it again to him, or to any other perſon, in place of the original pawn. If, however, they ſhould not concur in ſo doing, either of them may in that caſe refer the matter to the *Kázee*, who may take the value from the truſtee, and again deliver it to him, or to any other, in the place of the original pawn. If the *Kázee* do ſo, and the pawner afterwards diſcharge his debt, then, ſuppoſing that the reſponſibility for the value had attached to the truſtee in conſequence of his having reſtored the pledge to the *pawner*, the value in queſtion remains ſecure to the truſtee, as the pawner here appears to have recovered his pledge, and the pawnee his debt. If, on the contrary, the reſponſibility had attached to the truſtee in conſequence of his having ſurrendered the pledge to the pawnee, the pawner, upon diſcharging the debt, is entitled to take from him the value in queſtion; for as, in caſe of the exiſtence of the pawn, he would immediately on payment of the debt reſume it, he is by conſequence at liberty to take the ſubſtitute. It is to be obſerved, in this caſe, that if the truſtee have given the pledge to the pawnee in *loan* or *truſt*, and it have been deſtroyed without any tranſgreſſion on his part, he [the truſtee] is not entitled to take the value from him [the pawnee;]—whereas, if the pawnee have occaſioned the loſs, he is ſo entitled; for as the property of the thing has before veſted in him in virtue of his having compenſated for its loſs, it was of courſe his own property that he lent; and the borrower is therefore liable for its loſs *when occaſioned by himſelf*, but not otherwiſe. If, alſo, the truſtee give the pledge to the pawnee, "in order that he may preſerve it himſelf as a "ſecurity for his debt," and it be afterwards deſtroyed, he is entitled to take the value from the pawnee, whether he [the pawnee] were the occaſion of its loſs or not; for it was not given to him in the nature of *truſt* or *loan*, but on terms which implied a liability to make compenſation.

pawner commiſ- the e, or any other perſon, to ſell the pledge, and diſcharge the debt; but he cannot reverſe the commiſſion, if it be included in the contract.

If the pawner conſtitute the pawnee, or any other perſon of character, an agent for the ſale of the pledge, towards effecting a diſcharge of his debt at the expiration of the ſtipulated term, ſuch agency is valid; becauſe here the pawner has merely created an agent for the ſale of his own property. If, alſo, ſuch agency be expreſſed as an article in the contract of pawn, the pawner has not afterwards the power of reverſing it; becauſe where the agency is thus ſtipulated, it is one of the *rights* of the contract, and is therefore binding, in conſequence of the contract being ſo;—and alſo, becauſe, as the right of the pawnee is connected with it, the annulment of it would be a deſtruction of his right;—the caſe here being ſimilar to that of an agent for a defendant, who has been ſo created at the inſtance of the plaintiff; for ſuch agent cannot be diſmiſſed from his employ but in the preſence of the plaintiff.

Rules with reſpect to an ap- d to pledge.

If the pawner conſtitute any perſon his agent to ſell the pledge, without reſtricting him to ready-money or credit, ſo as to leave him entirely at his own option in thoſe points, and afterwards prohibit him from ſelling it on credit, ſuch prohibition is of no effect; for the agency (as was before mentioned) being at firſt abſolute, is not afterwards ſubject to the reſtriction of the pawner. In the ſame manner, the agent cannot be diſmiſſed by the pawnee, as on him he is no way dependant, having been created agent by the pawner. If, alſo, the pawner die, the agency nevertheleſs continues in force; for as the contract of pawn becomes not void upon the death of the pawner, ſo neither does the agency, that being expreſsly included therein. Beſides, if the contract were by this event rendered void, it would be ſo only with reſpect to the rights of the heirs of the pawner, to which the rights of the pawnee are ſuperior. The agent, moreover, is empowered to ſell the pawn without the conſent of the heirs, in the ſame manner as he would have done in the lifetime of the pawner without his conſent.—So likewiſe, if the pawnee ſhould die the agency does not determine; for a contract of pawn is not rendered void, either by the death of both the parties, or of one; but continues, as before, with all its rights and privileges; ſuch as poſſeſſion, diſcharge, and the agency in queſtion. The power of agency, however, ceaſes on the death of the agent; and his heir or executor cannot ſtand in his place; becauſe agency is not an inheritance, the conſtituent being ſuppoſed to have confided in his agent alone, and not in any other perſon. It is recorded from *Aboo Yooſaf*, that the agent's executor may ſell the pledge; for as the agency is binding, the executor has a power of ſelling it;—in the ſame manner as where a *Mozàrib*, after having exchanged the capital ſtock for any ſpecies of merchandize, dies,—in which caſe his executor is permitted to diſpoſe of the merchandize, the compact being ſtill binding. To this, however, it may be replied, that agency is the right of a principal over his factor; and the heirs of an agent can inherit only *his own* rights. It is otherwiſe with reſpect to *Mozàribat*, as the rights of that appertain to the *Mozárib*, or manager.

A PAWNEE has not a power of ſelling the pledge without the conſent of the pawner, as the property of it belongs abſolutely to him. Neither can the pawner ſell it without the conſent of the pawnee; for, as the thing pledged is, with reſpect to its worth, the right of the pawnee, it follows that the pawner, if he were to ſell it without the concurrence of the pawnee, would not have it in his power to ſurrender it to the purchaſer.

The pawnee [illegible] pawner's conſent.

IF, at the expiration of the ſtipulated term of credit, the agent refuſe to ſell the pledge depoſited for that purpoſe with him, and the pawner have abſconded, the *Kâzee* muſt compel him to execute the ſale, by impriſonment, or other compulſatory means, the agency being binding for two reaſons;—FIRST, becauſe, when expreſsly included in the contract of pawn, it becomes one of the rights thereof; and, SECONDLY, becauſe the right of the pawnee is connected with it; and the diſmiſſion of the agent annihilates that right. The ſame rules,

The agent, at the expiration of the term of credit, may be compelled to [illegible] in ſhort, hold in this inſtance, as in the caſe of an agent for the adjuſtment of a cauſe of diſpute created by the defendant at the inſtance of the plaintiff; for if the defendant abſcond, and the agent refuſe to ſettle the cauſe, he is compellable thereunto by the *Kázee*, for the ſecond reaſon above-mentioned, that the right of the plaintiff would elſe be deſtroyed. (It is otherwiſe with reſpect to a mere *agent for ſale*; for if he refuſe to execute the ſale, he cannot be compelled thereto; as his *conſtituent* may ſtill ſell the article, whence his right is not deſtroyed.) What is here advanced proceeds on the ſuppoſition of the agency being included in the contract of pawn; for if it have not been ſtipulated until after the execution of the contract, there is in that caſe a difference of opinion; ſome aſſerting that the agent cannot be compelled to execute the ſale, whilſt others maintain that he may be compelled. Of theſe the compiler of the *Hedáya* remarks that the laſt is the better opinion. *Aboo Yooſaf* has ſaid that the agency is equally binding in both caſes, (that is, when included in the contract, and alſo when made poſterior thereto.) And the *Jama Sagheer* and *Mabſoot* tend greatly to corroborate this opinion; for in treating of this ſpecies of agency they have ſuppoſed it *abſolute*, and not diſcriminated between that included in the contract of pawn and that agreed upon poſterior thereto.

If the pledge be ſold by commiſſion from the truſtee, the purchaſe-money is ſubſtituted in place of it.

WHEN the agent of a truſtee in whoſe hands a pledge has been depoſited ſells it, it is no longer in pawn, and the purchaſe-money ſtands in its place, (that is to ſay, is, as it were, in *pawn*,) although the agent may not yet have received it, as being the ſubſtitute for a thing which was before in his poſſeſſion. Hence, if the purchaſe-money ſhould be loſt, by the purchaſer (for inſtance) dying inſolvent without having diſcharged it, the loſs falls upon the pawnee; becauſe the contract of pawn ſtill continues in force with reſpect to the purchaſe-money, ſince that ſtands in the place of the thing ſold, namely, the pledge. In the ſame manner, where a pawned ſlave is ſlain, and the murderer accounts for his value, the contract ſtill continues in force, as the owner of the ſlave is entitled to the value in virtue of his property, notwithſtanding ſuch value be paid *in atonement for blood.* The ſame rule alſo holds where a ſlave, having killed another pawned ſlave, is commuted for the one ſo killed,—the murderer being in that caſe ſubſtituted for the murdered.

IF a truſtee, having been appointed agent for the ſale of the pledge, ſhould ſell it, and deliver the price to the pawnee by way of payment, and another afterwards prove a property in the pledge, and he accordingly pay that other a compenſation for its value, it then remains in his option, either to take the value from the pawner, or the amount of the purchaſe-money from the pawnee: but he is not permitted to take more from the pawnee than the purchaſe-money.—The compiler of the *Hedàya* remarks that this caſe may occur under two different circumſtances or predicaments:—I. where the pledge is deſtroyed after the ſale; and II. where it remains whole and complete.—In the former of theſe, the owner of the pledge is at liberty either to take a compenſation for the value from the pawner, who is an uſurper of his right, or from the truſtee, who has invaded it, in having ſold his property and delivered it to another. Should he, therefore, take it from the pawner, the ſale of the truſtee becomes valid, as does alſo the pawnee's ſeizin of the price in ſatisfaction for his debt; becauſe, as the pawner, by making compenſation, becomes proprietor of the pledge and effaces the uſurpation, it then appears that he had authorized the truſtee to ſell that which was *his own.*—If, on the contrary, he take the compenſation from the *truſtee,* he [the truſtee] may, if he chuſe, have recourſe to the pawner; that is to ſay, he may take from him the value of the pledge; for, as being his agent, and the manager of his affairs, he is conſequently entitled to an indemnification for whatever loſs he may have unavoidably ſuſtained in the execution of his commiſſion. And in this caſe, alſo, the ſale of the pledge is valid, as well as the pawnee's ſeizin of the purchaſe-money in ſatisfaction for his debt,—whence, in this caſe, he [the

If the having ſold the pledge any ſubſequent loſs, he may reim- from either party:

pawnee] cannot urge any future claim againſt the pawner on the ſcore of his debt.—Or, if the truſtee chuſe, he may have recourſe to the pawnee; that is to ſay, he may reſume from him the purchaſe-money which he had unjuſtly received from him; *unjuſtly*, becauſe it proved in the end to be the truſtee's property, by his having afterwards made good the loſs to the proprietor. For when he gave it to the pawnee, he ſuppoſed it to have been the property of the pawner; but he may not, perhaps, when it proves his own property, be inclined to confirm the transfer, and he is therefore allowed to reſume it. As, however, the reſumption of the purchaſe-money from the pawnee deprives him of a diſcharge of his claim, which the ſeizin of it was intended to effect, he therefore remains at liberty to demand payment from the pawner in this inſtance. In the *latter* of the above circumſtances, on the contrary, (where the pledge remains whole and complete after the ſale,) it is incumbent on the owner of the pledge to reſume it from the *purchaſer*, as he poſſeſſes the ſubſtance of his property; and the purchaſer is entitled to a reſtitution of the purchaſe-money from the truſtee, becauſe of his being the *ſeller*; after which the truſtee may, at his option, receive an indemnification either from the pawner or pawnee,—from the *former*, becauſe he occaſioned him to enter into the agreement, from which he is conſequently bound to releaſe him,—and from the *latter*, becauſe, when the thing ſold was proved to belong to another, the money obtained in lieu thereof is no longer termed *purchaſe-money*, and the pawnee having received it only as ſuch, his ſeizin is no longer of effect. If, therefore, he take the value from the pawner, the pawnee's ſeizin of the price is rendered valid:—whereas, if he reſume the purchaſe-money from the pawnee, his ſeizin being thereby deſtroyed, his former right (namely, the claim againſt the pawnee) exiſts as before.

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to him

—All that is here advanced proceeds on the ſuppoſition of the agency having been included as an article in the contract of pawn; for if the pawner appoint the truſtee his agent for the ſale of the pledge *after* the contract, he [the agent] is in this caſe to indemnify himſelf for any loſs he may ſuſtain, in conſequence of ſelling the pledge, from the *pawner*, not from the *pawnee*, notwithſtanding he may have made over to the pawnee the price he had received for the pledge, ſince with *this* agency the pawnee has no concern, inſomuch that the pawner may reſcind the agency without conſulting him.

alone for indemnification.

IF a pledged ſlave die in the poſſeſſion of the pawnee, and it be afterwards diſcovered that he was the property of another, not of the pawner, it remains with the proprietor to demand a compenſation from either the pawner or pawnee; for both are violators of his right, —the one in having delivered the pledge to another, and the other in having received it. If, therefore, he take a compenſation from the pawner, the pawnee, becauſe of the ſlave having died in his poſſeſſion, is held to have received payment of his debt; for as the pawner has obtained a property in the ſlave by indemnifying his owner, the payment of his debt is therefore effected by the ſlave dying in the pawnee's hands. If, on the contrary, he take a compenſation from the *pawnee*, he [the pawnee] is not only entitled to an indemnificatory ſatisfaction from the pawner, but his claim upon him ſtill exiſts as before:—he is entitled to an indemnification from the pawner, becauſe of his having deceived him; and his claim of debt exiſts as formerly, becauſe the diſcharge effected by the pledge having died in his poſſeſſion ceaſes to be of force upon his making good the value, whence his right reverts.

A ſtranger proving his right in a who had died with the pawnee, ſeek his penſat from e party.

OBJECTION, (by the *Kázee Aboo Khâzim.*)—It would appear that in this caſe the pawnee's claim does not exiſt as before, but that the death of the ſlave in his hands eſtabliſhes a ſatisfaction for it; becauſe, upon the pawner compenſating for the ſlave's value, (by the pawnee *recovering* ſuch value from him as above,) he becomes, in virtue of ſuch compenſation, *proprietor* of the ſlave, whence it appears that he, in fact, pledged that which was *his own*, and that the caſe is the ſame as if the proprietor had taken the compenſation from the

*pawner*,

*pawner*, which would exempt him from all further obligation to the pawnee.

Reply.—As the pawnee firſt pays the compenſation, he firſt becomes proprietor of the ſlave from the time of poſſeſſion; and when, afterwards, he retakes that ſum from the pawner, his property in the ſlave is annulled, and the *pawner* becomes proprietor of him. The *pawner*'s property in the ſlave, therefore, takes place, in this inſtance, *poſterior* to the contract of pawn, (the pawnee having, as it were, *ſold* the ſlave to the pawner, and received the price for him;)—and this debt to the pawnee remains againſt him as before,—whence the pawnee is entitled to take it from him. It is otherwiſe in the *former* alternative, (where the owner takes the compenſation from the *pawner*;) for in this caſe the pawner becomes proprietor from the time of the ſlave being in his poſſeſſion, (which was *prior* to the contract of pawn,) whence it may be ſaid that he merely pawned what was *his own*;—and upon the ſlave dying in the pawnee's hands, he ſtands acquitted of his debt, which the pawnee, therefore, cannot afterwards claim from him.

CHAP.

# CHAP. IV.

## Of the Power over Pawns; and of Offences committed *by* or *upon* them.

A pledge can ſold the pawnee's conſent;

IF the pawner ſell the pledge without the conſent of the pawnee, the ſale remains ſuſpended upon his will, becauſe of his right being involved in the pledge, notwithſtanding ſuch ſale be an act of the pawner with reſpect to what is his own property; in the ſame manner as where a perſon bequeaths the whole of his eſtate, in which caſe the legacy is ſuſpended in its effect, with reſpect to the exceſs, above one third, upon the conſent of his heirs, becauſe of their right being connected therewith. If, therefore, the pawnee aſſent to the ſale, it is valid; for it was before ſuſpended only on account of his right, which he here conſents to forego;—and it is alſo valid if the pawner diſcharge his debt; for the ſale is an act of the proprietor upon his property, being ſuſpended in its effect only becauſe of an obſtacle*, which obſtacle is here removed †.—In the former caſe, upon the pawnee having given his conſent, and the ſale having been thereby rendered valid, the right of the pawnee is transferred from the pledge to the thing given in exchange, namely, the price,—which, in the caſe here conſidered, then becomes a ſubſtitute for the original pledge. This is approved; becauſe the right of the pawnee is connected with the *worth* of the pledge; and the *return* is in effect the ſame as the

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* Namely, the pawnee's right connected with the pledge.

† By the diſcharge of the debt, which of courſe diſengages the pledge from any claim the pawnee might otherwiſe have upon it.

*conſideration*;

*conſideration*;—this being analogous to where an indebted ſlave is ſold by the conſent of his creditors; in which caſe their right is transferred from the ſlave to the value received for him, as they are ſuppoſed, in aſſenting to the ſale, to have agreed to the transfer of their right from the ſlave to the value, but not to the total abolition of it. If the pawnee refuſe his aſſent, and annul the contract of ſale, it is null of courſe, (according to one tradition,) whence, if the pawner redeem the pledge, ſtill the purchaſer is not at liberty to take it; for as the right of the pawnee is equivalent to his actual property, he therefore ſtands the ſame as the proprietor of the pledge;—(whence his power of acceding to, or annulling the contract of ſale.) According, however, to a more authentic tradition, the pawnee has not the power of annulling the ſale; for his right can ſuſtain no detriment, as the ſale cannot, at all events, be carried into execution until he aſſent to it. The execution of the ſale, therefore, being in this manner ſuſpended, the purchaſer has the option of waiting until the pawner may redeem the pawn, and reſign it to him conformable to the contract, or of carrying the matter before the *Kázee*; for the ſeller has it not in his power to deliver the goods, and the power of diſſolving the contract reſts with the *Kázee* alone; this being ſimilar to where a ſlave, having been ſold by his maſter, elopes before the purchaſer has received poſſeſſion of him, in which caſe the purchaſer may either wait until the ſlave return, or he may prefer a complaint to the *Kázee*, in order (as the ſeller is incapable of delivering the goods) to obtain an annulment of the contract.

who, if the pawner ſell it more than *once*, may ratify either ſale.

If the pawner ſell * the pledge without the conſent of the pawnee, and again, before the pawnee has ſignified his aſſent, ſell it to another perſon, in that caſe whichever of theſe two contracts the pawnee may confirm is valid; for as the firſt ſale is dependant on the conſent of the pawnee, it cannot prevent the ſecond from being ſo likewiſe. If, therefore, the pawnee chuſe, he may ratify the ſecond ſale. If, on the contrary, the pawner, after having firſt ſold the pawn as above, ſhould let, give, or pawn it to another perſon, and the pawnee give his conſent to ſuch leaſe, gift, or pawn, the ſale which preceded either of theſe deeds is valid. The difference between theſe two caſes is, that in the firſt (where one ſale is made after another) the pawnee may derive an advantage from confirming either of them, (as his right lies in the price,) and whichever, therefore, he approves is valid. In the caſe of a leaſe or gift, on the contrary, no advantage can accrue to the pawnee, as his right lies in the *return* for the article, not in the *uſufruct*. If, therefore, the pawnee approve of either of theſe, he by conſequence impliedly aſſents to the abolition of his own right; and the previous ſale (which was ſuſpended on his conſent only becauſe of his right) becomes valid of courſe.

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* The ſale here mentioned does not ſignify an *abſolute*, but a *conditional* ſale, depending, for its ratification, upon the pawnee's concurrence, as before mentioned.

A pawned ſlave may be emancipated by the pawner.

IT is permitted to a pawner to emancipate the ſlave whom he has depoſited in pawn; for as he is ſane and adult, he may of courſe render free his own property, which the pawn indiſputably is. As, moreover, the contract of pawn does not induce any deſtruction of the pawner's property in the pledge, his act with reſpect to it is not rendered void by the pawnee withholding his aſſent to it, notwithſtanding the pawnee's right (of detention in regard to the worth) be thereby defeated;—in the ſame manner as where the purchaſer of a ſlave emancipates him without having taken poſſeſſion; in which caſe the ſlave is free, notwithſtanding the ſeller's right (of detention of the article in ſatisfaction for the price) be thereby rendered null.

OBJECTION.—If a perſon bequeath a ſlave to another upon his deathbed, and leave no other effects except that ſlave, and the heirs of the teſtator afterwards emancipate the ſlave, ſuch manumiſſion is not valid, becauſe of the right of the legatee; and hence it would follow that a pawned ſlave cannot be emancipated, becauſe of the right of the pawnee.

Reply.—The manumiſſion of the ſlave by the heirs of the teſtator is not (in the opinion of *Haneefa*) void, but is merely *ſuſpended until* ſuch time as he [the ſlave] ſhall have performed emancipatory *labour.*

—The *ſale*, moreover, or *gift of a pawn is null, for this reaſon, that* the pawner is unable to ſurrender it to the purchaſer or donee,—an objection which does not obtain in the caſe of manumiſſion, ſince in that inſtance a delivery is not required. The manumiſſion is therefore valid, and takes immediate effect,—whence the contract of pawn is null, as the ſubject of it no longer remains. Conſequently, if the pawner be rich, and the debt to the pawnee be then due, he [the pawnee] may require payment of it immediately;—or, if it be not due until after the expiration of a term, he may take from the pawner the value of the ſlave, and return it as a ſubſtitute until his debt become payable, when he may take it in ſatisfaction of his right, reſtoring any ſurplus which may remain from it to the pawner. This is ſuppoſing the pawner to be *rich*; for, if he be *poor*, the ſlave in queſtion muſt perform emancipatory labour to an amount adequate to his value; and with this (which, if it be of a different ſpecies from the debt, muſt firſt be converted into the ſame) the debt of the pawnee is to be diſcharged; for a diſcharge from the pawner being here impoſſible, it is conſequently made from him who enjoys the advantage of the manumiſſion, namely, the ſlave. The ſlave however, when his emancipator afterwards becomes rich, is entitled to take from him the ſum he earned; becauſe he has, in fact, paid his debt, not voluntarily or gratuitouſly, but in conformity with the ordinance of the LAW in this particular *.

who, if he be rich, muſt the wn for the ſlave;

but if he be poor, the ſlave muſt perform emancipatory labour to the amount of his value for the diſcharge of the pawnee's claim,

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* The remainder of this diſcuſſion is omitted by the tranſlator, as being merely a repetition of what has been already ſet forth at large under the head of *Manumiſſion*.

IF a perſon make a declaration of having pawned his ſlave, by ſaying to him, "I have depoſited you in pledge with ſuch a perſon," and the ſlave deny it, and the maſter afterwards emancipate him, at a time when he is poor, it is incumbent upon the ſlave to perform emancipatory labour, according to our doctors. *Ziffer* is of a contrary opinion; for he holds this caſe to be analogous to where a maſter *firſt* liberates his ſlave, and then declares his having pawned him;—in which caſe, if the maſter be poor, and the ſlave deny it, (as above,) emancipatory labour is not incumbent on the ſlave; and ſo here likewiſe. Our doctors, on the other hand, argue that, in the caſe in queſtion, the maſter declares the pawn at a time when he is undoubtedly competent to it, as he ſtill poſſeſſes a property in the ſlave, not having yet emancipated him; and conſequently his declaration is valid.—It is otherwiſe where the declaration of pawn is made ſubſequently to the emancipation, as the maſter's power of pawning is then terminated;—whence there is no analogy between the caſes.

**although he ſhould have *denied* his being in pawn previous to ſuch manumiſſion.**

IF a pawner create the ſlave whom he has pawned a *Modabbir*, it is valid, according to all authorities:—according to our doctors, becauſe, as the *complete* emancipation would be lawful, it follows that this qualified emancipation is lawful, *a fortiori*; and according to *Shaëi*, becauſe the granting *Tadbeer* to a ſlave does not (as he holds) prevent the ſale of him. In a ſimilar manner, it is in the power of a pawner to conſtitute his pawned female ſlave an *Am-Walid*; for as a father has this privilege with reſpect to the female ſlave of his child, becauſe of the right which he has in his property, notwithſtanding ſuch right be inferior to that of the child himſelf, it follows that the exertion of the ſame privilege by a pawner, in virtue of his right in the pledge, is valid *a fortiori*, the right of the pawner being ſuperior to that of any other perſon, as he is the proprietor.—When, therefore, a pawned ſlave is conſtituted either *Modabbir* or *Am-Walid*, ſuch ſlave is excluded from the contract of pawn, as the intention is defeated, ſince a debt cannot be diſcharged by means of a *Modabbir*

**A pawner may create his pawned ſlave a *Modabbir* or *Am-Walid*;**

**and if he *rich*, he ſubſtitute value in pawn; but if he be poor,**

perform

the debt.

or *Am-Walid*[*];—whence, if the pawner be *rich*, he is reſponſible for the value, after the manner before ſhewn in the caſe of pawned ſlaves emancipated;—but if, on the contrary, he be in *indigent* circumſtances, the pawnee may require from the *Modabbir* or *Am-Walid* emancipatory labour to the amount of the debt, as the fruit of their labour is the property of their maſter. It is otherwiſe in the caſe of a pledged ſlave emancipated by an indigent pawner; for the fruits of his labour being *his own* property, he is obliged to labour to the amount of his *value* only, or that of the debt of the pawner, in caſe of its being leſs than his value.

The pawner, on becoming
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It is not permitted either to a *Modabbir* or *Am-Walid* to reſume from their maſter when he becomes rich what they paid on his account when poor, becauſe they in fact paid this from *his property*[†]: but when a poor pawner emancipates the ſlave whom he had pledged, he [the ſlave] is entitled to take whatever he may have paid on account of his emancipator; becauſe he has paid it from his *own property*[‡],—and this from neceſſity, in conformity with the precepts of the LAW, (as before obſerved,) whence ſuch payment cannot be conſidered as *gratuitous*[§]. Some have ſaid, that if the debt be not due at that time, the *Modabbir* or *Am-Walid* are compellable to earn their value; which, as being a ſubſtitute for the pawn, muſt be detained as ſuch in lieu of the original: but that if, on the contrary, the debt be then due, it is in that caſe neceſſary to diſcharge it from the ſtock of the pawner; and as the earnings of the *Modabbir* or *Am-Walid* are conſidered as the property of the maſter, they muſt therefore labour towards obtaining a ſum adequate to the whole of the debt.

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[*] Becauſe *Modabbirs* and *Am-Walids* cannot be ſold.

The earnings of their labour being his right.

The labour and earnings of a *freedman* being conſidered as *his own property*.

[§] A perſon is not entitled to recover, who pays the debts of another in a *gratuitous* manner.

If

An pa bir [illegible] owe the pawnee labour beyond his value.

If a pawner emancipate the ſlave whom he had created a *Modabbir*, as above, it is not then incumbent on the freedman to earn a greater ſum than his value, although he ſhould be thereunto commanded by the *Kázee*; for, after emancipation, the fruits of his labour are his own property. Still, however, he cannot recover from his maſter what he had paid on his account prior to his freedom, as that was, in fact, the property of the maſter.

or by

If a pawner *deſtroy* the thing he had pledged, the ſame rules hold as are eſtabliſhed in the caſe of *emancipating* the pledge.

If a ſtranger (that is, a perſon unconcerned in the contract) deſtroy the pledge, the pawnee (not the pawner) is litigant againſt him, and may take from him a compenſation for the value, which he muſt retain in pawn in place of the original pledge; for the pawnee, as being the moſt entitled to the *ſubſtance* of the pledge, is alſo moſt entitled to its ſubſtitute, namely, the *value*. It is here to be obſerved, that the ſtranger muſt compenſate for the pledge according to the value which it bore at the time of its being deſtroyed. If, therefore, it be valued at five hundred *dirms* at the period of its deſtruction, and at one thouſand *dirms* on the date of the contract, the ſtranger muſt account for five hundred *dirms* to the pawnee, who muſt retain the ſame in pawn;—and five hundred *dirms* are remitted from the debt; for the deficiency to that amount is a deſtruction which has occurred in the hands of the pawnee, occaſioned (as it were) by the viſitation of heaven; and as the property has thus periſhed in his hands, a proportionable amount is therefore deducted from his claim.

or by the *pawnee*.

If the pawnee deſtroy the pledge before the expiration of the ſtipulated term of payment, he is reſponſible for the value, becauſe of his having deſtroyed the property of another;—and this value he is to retain in pawn until the term of payment arrive; for as it is a ſubſtitute for the ſubſtance of the pledge, it is conſequently ſubject to the ſame rule. As ſoon, therefore, as the debt becomes due, the pawnee may take it from the value; and if then a balance remain, it muſt be reſtored to the pawner, as being a return for his property, with which the pawnee has no concern.

A depreciation in the value of the pledge occaſions a proportionable deduction from the pawnee's claim.

If a perſon pawn any article eſtimated at one thouſand *dirms*, in ſecurity of a debt of the ſame amount payable at ſome future period, and the article, in conſequence of a fall on the price, bear afterwards a value of five hundred *dirms*, and be then deſtroyed in the pawnee's hands, he [the pawnee] is reſponſible for five hundred *dirms*, and five hundred are alſo remitted from his debt; for the deficiency of five hundred *dirms* ariſing from the fall in the price being (as it were) a decay of part of the pawn whilſt in the hands of the pawnee, an adequate ſum is therefore retrenched from his claim; and the remaining five hundred *dirms* are likewiſe due from him in conſequence of the decay, and remain with him in pawn, as before ſtated.

The pawnee lending the pledge to the pawner, is freed from reſponſibility during the loan;

If a perſon, having received a ſlave in pawn, lend him to the pawner, in order that he may enjoy the uſe of his ſervice, or for any other purpoſe, and the pawner take poſſeſſion, the ſlave is no longer a ſubject of reſponſibility with the pawnee; (in other words, if he be killed or loſt in the hands of the pawner, the pawnee is not thence held to have received payment of his debt;) becauſe he has paſſed out of the poſſeſſion of the pawnee; and the ſeizin of the pawner in virtue of a loan does not ſtand as the ſeizin of the pawnee, as the tenure of a loan is repugnant to that of a pawn, ſince the latter induces reſponſibility, whereas the former does not. The pawnee, however, is at liberty at any time to reſume the pledge from the pawner; becauſe he holds it by the tenure of a *loan*, which is not binding; and alſo, becauſe the contract of pawn ſtill ſubſiſts;—whence it is that if the pawner were to die without having returned the pledge, the pawnee

but he may reſume it at pleaſure, and then his reſponſibility reverts.

pawnee would in that caſe have a claim upon it in preference to the other creditors; (that is to ſay, he would be entitled firſt to take a ſatisfaction for his claim from the pledge; which done, if any part ſhould remain it would be diſtributed among the other creditors.)

OBJECTION.—If a pawnee be not held liable for a pledged ſlave after he is lent, how is the contract of pawn ſuppoſed then to exiſt?

REPLY.—Reſponſibility is not, in every inſtance, one of the requiſites of a contract of pawn;—whence it is that the effect of the contract reaches to the child of a pawned female ſlave, although ſuch child be not a ſubject of reſponſibility from loſs or deſtruction. —As, therefore, the contract ſtill ſubſiſts, if the pawnee reſume the pledge from the pawner, he again becomes liable for it, in the ſame manner as formerly, having again taken poſſeſſion of it in virtue of the contract of pawn.

The pledge, [illegible] either is no longer a ſubject of reſponſibility.

IF either of the parties to a contract of pawn lend the pledge with the concurrence of the other to a ſtranger, it is not in this caſe a ſubject of reſponſibility to the pawnee, any more than in the former inſtance: but the contract of pawn ſtill continues in force, and either party is entitled to reſume the pledge from the borrower, and to place it in pawn as before, from the intereſt each has in it.

The pledge, on being diſpoſed of by either party, with the conſent of the other, is excluded from the

IF either party, with the conſent of the other, let, ſell, or beſtow the pawn in gift to a ſtranger, it is excluded from the contract, and cannot again be ſubject to it, unleſs the parties conclude a freſh agreement. It is to be obſerved that if, in any of theſe caſes, the pawner die before a reſtitution of the pledge be made to the pawnee, he [the pawnee] is upon the ſame footing with the other creditors; becauſe as, in conſequence of theſe acts, a binding right of others is connected with the pledge, the effect of the contract no longer remains;—whereas no *binding* right is connected with a pledge in conſequence of the loan of it;—for which reaſon there is an eſſential difference between the caſes here conſidered and that of loan.

*If the pawnee borrow the pledge from the pawner for any particular purpoſe*, and it be deſtroyed previous to his having applied it to that purpoſe, he is reſponſible for it,—that is to ſay, a ſum proportionate to its value is retrenched from his claim; for until he apply it to that uſe for which he has borrowed it, the ſeizin which he had made in virtue of the contract of pawn ſtill ſubſiſts. The law is ſimilar where the pawn is deſtroyed after the pawnee has accompliſhed the ſervice for which he had borrowed it; for then his ſeizin of *loan* exiſts no longer. If, on the contrary, it be deſtroyed during the period in which he enjoys the uſe of it, he is not reſponſible, as at that time he holds it in *loan*, not in *pawn*. (The ſame rule alſo holds where the pawner conſents to the pawnee's making uſe of the pledge*.)

A perſon *borrowing* an article, with intention to pawn it, is reſtricted in the pawn according as he ſpecifies the particulars of the debt, &c. or otherwiſe;

If a perſon borrow a robe from another, with an intent *generally* declared "to pawn it," he may accordingly pawn it in ſecurity for any debt whether great or ſmall;—whereas, if the lender particularly ſpecify the ſum in ſecurity for which the borrower may pawn the robe, he is not, in that caſe, permitted to pawn it for a ſum either larger or ſmaller than what is ſo ſpecified;—not for a *larger* ſum, becauſe the intention of the lender is, that the robe ſhall be pawned for a debt which may be eaſily diſcharged, an intention which is obviouſly defeated in the caſe of pawning it for a *large* ſum;—nor for a *ſmaller* ſum, becauſe the view of the lender here is, in caſe of its loſs, the obtaining from the pawner that ſum which he would receive from the pawnee in conſideration of the extra value of the pledge. The ſame rule alſo holds where the lender ſpecifies either the particular ſpecies of debt, the perſon who is to receive the pawn, or the city in which the contract is to be concluded;—ſuch reſtrictions being ſeverally attended with particular advantage; for the payment of ſome debts is more eaſily effected than of others,—and it is alſo more convenient to make payment in ſome cities than in others, and ſo likewiſe it is of advantage to particularize the perſons, as ſome men are juſt and careful, whilſt others are not ſo. If, therefore, in any of theſe caſes, the borrower act contrary to the directions of the lender, he becomes reſponſible for the value of the article in caſe of loſs;—and when this happens, the lender has it in his option either to take a compenſation from the borrower, (in which caſe the contract of pawn ſubſiſts entirely between the borrower and the pawnee, ſince the former, by paying a compenſation for the pledge, becomes ſole proprietor of it,) or from the pawnee, who will take an indemnification from the pawner, and likewiſe receive payment of his debt, as has been before explained in the caſes of claims laid to pledges. If, on the contrary, the borrower conform to the directions of the lender, by pawning the robe for the exact ſum to which he was reſtricted, and the value of the robe be equal to, or greater than the amount of the debt, the pawnee is held, in caſe of its loſs, to have received payment of his debt, and the proprietor of the robe receives from the pawner the amount of the debt, being the ſum which the borrower had cleared by means of his property;—(and it is on this account that the borrower muſt pay the amount of the debt,—*not* becauſe he was ſeized of the robe, as that was in virtue of a free loan from the proprietor.)—In the ſame manner if, when the pawner had conformed to the direction of the lender, the robe be in any degree depreciated, the pawnee forfeits a proportionate part of his claim, and a like ſum is due from the borrower to the lender, becauſe of ſo much having been retrenched from his debt. If the value of the robe be ſhort of the amount of the debt, and it be

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* That is,—where the pawnee, being already poſſeſſed of the pledge, obtains the owner's conſent to make uſe of it.—For the elucidation of what is here advanced it is proper to remark, that a pledge may either be delivered to the pawnee, given in truſt to an *Adil*, or retained in the hands of the owner [the pawner] under a reſponſibility to account for it if neceſſary.

and if he tranſgreſs, is reſponſible for the value in caſe of loſs loſt in pawn, a ſum equivalent to its value is retrenched from the claim, and the remainder of the debt is due from the pawner, as no diſcharge of debt is effected beyond the amount of the value of the robe; and the pawner is, moreover, indebted to the lender for the value of the robe, having by means of it made payment of as much of his debt.—If, alſo, the value of the robe be adequate to the amount of the debt, and the proprietor be deſirous of redeeming his property, on the part of the pawner, by paying the amount, the pawnee is not in that caſe allowed to object to the reſtoring of it; becauſe the robe being the property of the lender, he does not, conſequently, by redeeming it, officiouſly intermeddle in an affair which does not concern him; (whence he is entitled to take from the pawner [the borrower] the ſum which he pays towards the redemption of the pawn;) and the *Kázee* muſt therefore compel the pawnee to ſurrender the robe. It is otherwiſe where an unconcerned perſon pays the debt of the pawner; for as, by endeavouring to redeem a thing which is not his own property, he interferes in a buſineſs which does not relate to him, the pawnee is not therefore compellable to ſurrender the pledge to him.

but not if it be loſt before pawn, or after redemption.

If the borrowed article be loſt in the hands of the borrower, either prior to his having pawned it, or poſterior to his having redeemed it, he is not reſponſible; for here he has not accompliſhed any diſcharge by means of the value, which (as we have ſhewn in the above caſe) is the ſole cauſe of reſponſibility.

On diſputes concerning the loſs of the pledge, the depoſition of

with reſpect to the perſon

If a diſpute ariſe between the lender and borrower after the loſs of the pledge, the lender aſſerting that it had been loſt whilſt in the hands of the pawnee, and the borrower on the other hand maintaining that it was loſt in his *own* poſſeſſion, either before he had pawned it or after he had redeemed it, the declaration of the borrower, upon oath, muſt be credited, becauſe he is, in this caſe, the defendant, as he denies having paid the debt by means of the others property.—If, on the contrary, they diſagree concerning the amount of the debt to which the lender had reſtricted the pawning of the robe, the declaration of the *lender* is credited; for as his depoſition would be credited if he were to deny the loan itſelf, it follows that where he merely denies a *quality* of the loan it is credited *a fortiori.*

in whoſe hands it was loſt, and that

to the
tions of the loan.

If the borrower of the robe pawn it on the faith of a promiſe,—that is, on a perſon promiſing to lend him a certain ſum of money, and that perſon accept the pledge, and make the promiſe accordingly, and the pledge (which is ſuppoſed to be equal to the amount of the debt) be loſt before the pawnee had fulfilled his engagement, he [the pawnee] is in that caſe reſponſible for the ſum ſo promiſed, as a promiſe is held to be the ſame as a real debt;—and the lender is entitled to receive from the pawner the ſum which he takes from the pawnee.

A perſon receiving a borrowed article in pledge on the faith of a promiſe, muſt pay the ſum promiſed

pays the ſame to the lender.

If a perſon lend his ſlave to another, that he may pawn him, and the borrower pawn him accordingly, and the lender afterwards emancipate him, he is accordingly free; for the owner's property in him is not deſtroyed by the circumſtance of his being pawned. And in this caſe the pawnee may either receive payment of his debt from the pawner, (who is ſtill indebted to him,) or he may take from the pawnee the value of the ſlave by way of compenſation, as the right which he had in the worth of the ſlave was deſtroyed by the lender emancipating him;—and having thus received the value, he may retain it in pawn until ſuch time as he obtain payment of his debt, upon which he muſt reſtore the ſaid value to the owner.

The lender of

him, lodging the *value* with the pawnee, in ſubſtitute for the pledge.

If a perſon borrow a ſlave or a camel with intent to pawn it, and having firſt employed the ſlave in ſervice, or rode upon the camel, he then pawn it in ſecurity of a debt adequate to its value, and having

The borrower

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pawn or

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afterwards diſcharged the debt, the pledge be completely deſtroyed in the hands of the pawnee before reſtoration, in that caſe the pawner i not reſponſible; for when he concluded the pawn he became exempt from reſponſibility, notwithſtanding he had previouſly enjoyed the uſufruct; ſince although he at firſt tranſgreſſed, yet he afterwards retracted, and acted in conformity with the intention of the lender. In the ſame manner, if the pawner, after having redeemed the pledge, employ it in ſervice, without occaſioning any detriment to it, and it be afterwards deſtroyed by ſome unforſeen contingency, he is not reſponſible; becauſe the term of the loan having expired upon the redemption of the pawn, he is no longer a *borrower*, but becomes from that period a *truſtee*; and although, in taking the ſervice of the pawn, he was guilty of a tranſgreſſion, yet as he afterwards retracted and conformed to the intention of the lender, he becomes thenceforth free from all reſponſibility. It is otherwiſe in the caſe of a perſon who has borrowed any thing not with an intent to pawn it; for his ſeizin, being derived merely from the loan, is not therefore the ſame as that of the proprietor, to whom he is conſequently bound to reſtore the thing which he borrowed. In the caſe, on the contrary, of a loan with intent to *pawn*, when the thing is pawned the object of the lender is obtained; for his view is to have recourſe to the borrower; that is to ſay, that when the pawn is deſtroyed in the poſſeſſion of the pawnee, and a diſcharge of debt thereby proved, he may take from the borrower a ſum adequate to what he is held to have diſcharged by the loſs of the pawn: wherefore if it be deſtroyed in the hands of the borrower, without a tranſgreſſion on his part, he is not reſponſible.

A pawner

If the pawner kill the ſlave whom he had pledged, he is reſponſible for the value; becauſe by the murder of the ſlave he deſtroys the right of the pawnee, which is ſacred and inviolable; and a right of this nature, attaching to the property of any perſon, renders him [the proprietor] the ſame as a ſtranger with reſpect to reſponſibility; like the connexion of the right of the heirs with the property of a dying perſon, which prevents the effect of his gratuitous acts in any thing beyond the third of his eſtate; or like the connexion of the right of a legatee with the legacy bequeathed to him, which, if the teſtator's heirs ſhould deſtroy the article [bequeathed to him in legacy,] renders them reſponſible for the value as a ſubſtitute.

and ſo in pro-

IF the pawnee commit any offence upon the pledge *, a ſum is remitted from his debt equivalent to the atonement for ſuch offence; becauſe the *ſubſtance* of the pledge belongs to the proprietor [the pawner;] and as the pawnee has tranſgreſſed upon it in this inſtance, he is conſequently reſponſible to the proprietor for having ſo done.

Any offence committed by a *property* of his pawner is of no account;

IF a pledged ſlave be guilty of an offence againſt the pawner, either in perſon or property, ſuch offence is of no account,—that is to ſay, is not attended with any effect;—and in this our doctors have been unanimous; for as the offence is here committed by the *property* on the *proprietor*, the cognizance of it would tend to no advantage. (By the *offences* here alluded to is to be underſtood merely ſuch as induce *e*, not ſuch as occaſion *retaliation*.)

nor ſuch offence committed by him upon the

IF a pledged ſlave be guilty of an offence againſt the perſon of the pawnee, this likewiſe (in the opinion of *Haneefa*) is of no account.—The two diſciples have judged otherwiſe.—The argument adduced by them is that as, in this caſe, the offence does not affect the proprietor, an advantage may be derived from a cognizance of it, ſince the ſlave may be made over [to the pawnee] in reparation of the injury.—The offence is therefore of account in this inſtance; and ſuch (according to them) being the caſe, it follows that if the pawner and pawnee

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Such as by *maiming*, or

concur in diſſolving the contract of pawn, and the pawner either deliver the ſlave, or pay a ſum to the pawnee in atonement for the offence, the obligation of debt is void*:—but if the pawnee ſhould ſignify that " he does not deſire *any* compenſation for the offence," the ſlave remains in pawn as before. The argument of *Haneefa* is, that no advantage can poſſibly reſult from taking cognizance of the offence in queſtion; for if cognizance of it be taken on account of the pawnee, it is then incumbent on him to extricate the ſlave from the guilt in which he is involved†; wherefore he muſt firſt *pay* the expiatory ſum, and then again *receive* it, in which there is evidently no advantage.

nor upon his *property*, provided his value do not exceed the debt for which he ſtands pledged:

If a pledged ſlave commit an offence upon the property of the pawnee, ſuch offence is of no account, according to all our doctors, provided the value of the ſlave be adequate to the amount of the debt; for here no advantage can reſult from taking cognizance of the offence; as the remedy applicable in this caſe is an appropriation of the ſlave to the pawnee, in compenſation for the injury he had ſuſtained,—a remedy which cannot here be effected, as the ſlave is not *made over* in atonement for the offence, but is *ſold*, and a compenſation for the injury he has done to the property of the pawnee diſcharged from the purchaſe money;—and as the ſum appropriated to the diſcharge of the compenſation is deducted from the debt, there is finally no advantage in taking account of the offence in this inſtance. If, on the contrary, the value of the ſlave exceed the amount of the debt, there are two opinions recorded from *Haneefa* upon the caſe.—One is, that the offence may be redreſſed in the proportion in which the value [of the ſlave] exceeds the debt, a pledge being a truſt with reſpect to any exceſs, and the injury in this caſe being ſimilar to that committed by a ſlave in depoſit on the property of the truſtee. The other is, that the offence cannot be redreſſed at all; for as the effect of the contract of pawn (namely, the detention of the ſlave on account of debt) applies to the exceſs as well as to any other part of the pledge, it may therefore be ſaid that he is a ſubject of reſponſibility *in toto.*

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* Becauſe the ſlave here appears to have been "*loſt in the hands of the pawnee*," a circumſtance which liquidates his debt.

Becauſe he is poſſeſſed of the ſlave in a way which induces reſponſibility.

IF an offence be committed by a pledged ſlave on the ſon of the pawner or pawnee, it is cognizable; for, as the right of property of a father is, in reality, diſtinct and ſeparate from that of his ſon, the crime is therefore the ſame as if committed upon a ſtranger.

IF a perſon pawn a ſlave eſtimated at one thouſand *dirms*, in ſecurity for a debt of the ſame amount, payable at ſome future period, and the value of the ſlave be afterwards lowered to one hundred *dirms* from a fall in the price*, and a perſon then kill the ſlave, and pay a compenſation of one hundred *dirms*, (being the value he at that time bears,) and the time of payment arrive, the pawnee muſt in this caſe keep poſſeſſion of the hundred *dirms* aforeſaid in lieu of his debt, and has no further claim whatever upon the pawner.—This is founded upon an eſtabliſhed rule, that no regard is paid to any depreciation of a pledge from a fall in the price, regard being had ſolely to the value it bore at the time of the contract of pawn;—whence it is that (as is here mentioned) a diminution of the value of a pledge from a fall in the price does not occaſion a remiſſion of the debt, according to our doctors:—contrary to the opinion of *Ziffer*, who contends that, upon the pledge ſuſtaining any loſs with reſpect to its *worth*, it may be ſaid to ſuſtain a loſs with reſpect to the *ſubſtance* alſo. The argument of our doctors is, that a fall in the *price* ariſes merely from a decreaſe of deſire in men towards the article,—a circumſtance to which no regard

If the be deſtroyed after depreciation, the pawnee muſt remain ſatiſfied with the compenſation he recovers from the de-is paid in the caſe of *ſale*, (whence the purchaſer has no option in conſequence of any caſual fall in the market, but owes the whole price agreed for,) nor in the caſe of *uſurpation*, (whence an uſurper, upon reſtoring the article he has uſurped, is not reſponſible for any depreciation it may have ſuſtained in the interim of uſurpation from a fall in the price.) As, therefore, no part of the debt is remitted in conſequence of a fall in the price, the ſlave continues in pledge oppoſed to the whole of the debt;—and upon any perſon killing him, he pays the value which he [the ſlave] then bears, namely, one hundred *dirms*; (for, in exacting compenſation, regard muſt be paid to the value at the time of the deſtruction taking place;)—and the pawnee takes the hundred *dirms*, as being a compenſation for the worth of the pledge with reſpect to the owner of it. But, after this, the pawnee has no further claim on the pawner; becauſe the ſeizin of the pawnee ſtands as a ſeizin of payment from the time of his obtaining poſſeſſion of the pledge, which payment is confirmed in the event of the loſs of the pledge whilſt in his poſſeſſion. The value of the ſlave, moreover, at the beginning was one thouſand *dirms*, and upon his being deſtroyed in the hands of the *pawnee*, he [the pawnee] is accounted to have received payment of his *whole debt* in virtue of his original ſeizin. But ſince, in conſequence of his having received one hundred *dirms*, it is impoſſible that he can alſo be thus accounted to obtain payment of one thouſand *dirms* (the original value of the ſlave) without inducing uſury, the matter is therefore ſettled thus,—that he received theſe hundred *dirms* as part payment of his debt of one thouſand *dirms*, and that there ſtill remain nine hundred *dirms* annexed to the ſubſtance of the pledge; and that, upon the pledge being deſtroyed in his poſſeſſion, he is in conſequence of ſuch deſtruction accounted to receive payment of nine hundred *dirms*. It is otherwiſe where the ſlave dies a natural death in the hands of the pawnee; for as, in that caſe, there can be no imputation of uſury, he is therefore held to have received payment of the *whole* of the debt in that inſtance.

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* That is, from a fall (for inſtance) in the *current* or *market* price.

If a perſon pawn a ſlave eſtimated at one thouſand *dirms* in ſecurity of a debt of the ſame amount, and the value of the ſlave be afterwards lowered to one hundred *dirms* by a fall in the price, and the pawnee be authorized by the pawner to ſell the ſlave, and accordingly ſell him for one hundred *dirms*, and take poſſeſſion of the price towards the diſcharge of his debt,—he is ſtill entitled to receive from the pawnee the remaining nine hundred *dirms*; for as the pawnee ſold the pledge at the inſtance of the pawner, it is in effect the ſame as if the pawner had taken it back and ſold it himſelf,—in which caſe the agreement would be diſſolved, and the debt would continue in force, except in regard to that ſum which the pawnee had received,—and ſo here likewiſe.

but if (after

the pawnee
for payment
of his claim,
he is ſtill entitled to any
deficiency.

If a perſon pawn a ſlave valued at one thouſand *dirms* againſt a debt of the ſame amount, and afterwards a ſlave valued at one hundred *dirms* kill the ſlave in pawn, and having been given in compenſation for his blood, be detained in pawn in lieu of him, the pawner is in that caſe compellable to redeem him by the payment of the whole of the debt, namely, one thouſand *dirms*. This is the opinion of *Haneefa* and *Aboo Yooſaf.* *Mohammed* maintains that the pawner is in this caſe at liberty either to redeem the pledge by diſcharging the whole of the debt, or to transfer the property of it to the pawnee as a commutation. *Ziffer*, on the other hand, contends that the ſlave who perpetrated the murder is to remain in pawn in ſecurity of one hundred *dirms*; and that the remaining ſum of nine hundred *dirms* is accounted to be diſcharged; becauſe (as he argues) the ſeizin of the pawnee in virtue of the contract is a ſeizin of payment, which is fulfilled in this caſe by the deſtruction of the pledge: but as the pledge has left behind it a return or conſideration, equivalent to the tenth part of the debt, ſuch part is therefore ſtill due, and the ſlave is detained in pawn in ſecurity thereof. The argument of our doctors is, that in this caſe no part of the debt is remitted; becauſe the ſecond ſlave is a ſubſtitute for the firſt, in regard merely to *fleſh* and *blood*, (that is, in regard to

The pawner
muſt redeem
a ſlave of
*leſs* value
ceived by the
pawnee in
compenſation
for having
ſlain the ſlave
in pledge) by
payment of
his *whole debt.*

*appearance*;) and as, in caſe of the exiſtence of the *firſt* ſlave, if the value were to be diminiſhed by a fall in the price, ſtill no part of the debt (as we have before ſhewn) would be on that account annulled,—ſo neither is any part annulled when another ſlave is ſubſtituted for the one originally pledged. *Mohammed* has indeed ſaid that the pawner may nevertheleſs refuſe to redeem the pledge; for when a change and diminution of value took place in the pawn whilſt in the poſſeſſion of the pawnee, (which is a cauſe of reſponſibility,) the pawner became empowered to object to the redemption of it;—in the ſame manner as where a ſlave kills a purchaſed ſlave antecedent to the delivery of him,—in which caſe the purchaſer has it at his option either to accept the ſlave who committed the murder in lieu of the one he purchaſed, or to annul the contract [of ſale.] To this, however, the two *Elders* reply, that upon the ſecond ſlave being, with regard to appearance, ſubſtituted for the firſt, it may be ſaid that no change takes place in the identity of the ſlave; and as the ſubſtance of a pawn is a *truſt* in the hands of the pawnee, it follows that the pawner cannot render it the property of the pawnee unleſs he ſhould conſent thereunto.—Moreover, the transfer of a pledge in commutation of the debt to which it ſtood oppoſed was a common practice in times of ignorance, but has ſince been proſcribed by the LAW. It is otherwiſe with reſpect to the caſe of ſale adduced as a parallel by *Mohammed*; for there the buyer has the option of annulling the contract of ſale; and the annulment of ſale is permitted by the LAW.

The fines incurred by a pledged ſlave muſt be defrayed by the pawnee;

IF a pledged ſlave ſlay a perſon by miſadventure, the fine of blood is in that caſe chargeable to the pawnee, who muſt defray it accordingly:—nor is he at liberty to commute the ſlave for it, as he has not the power of transferring the property of him to any perſon. If, therefore, the pawnee diſcharge the whole fine, the ſlave is thereby rendered pure; and the ſtains of guilt being thus effaced, his [the pawnee's] claim of debt ſubſiſts as before: but he is not entitled to make any demand on the pawner on account of the ſum which he paid in expiation of the crime of the ſlave; for as it was committed whilſt in his poſſeſſion, (a circumſtance which occaſions reſponſibility[*],) the atonement for it therefore reſts upon him. If, however, the pawnee object to the payment of the penalty, the pawner muſt in that caſe be ordered either to pay the fine, or to make over the ſlave in lieu of it; for the pawner is the *proprietor* of the ſlave; and the fine was chargeable to the pawnee merely for this reaſon, that his right is connected with the ſlave [in virtue of *pawn*,] and not becauſe of his being in any reſpect the *proprietor*. Upon his refuſal, therefore, the claim of atonement for the offence lies againſt the pawner, as being proprietor of the ſlave; and the atonement, in the preſent inſtance, is either paying the fine of blood, or making over the ſlave in lieu of it. If the pawner adopt the *latter* alternative, his debt to the pawnee is held to be completely diſcharged; for the tranſfer having been incurred by an offence committed by the ſlave whilſt *in the pawnee's poſſeſſion*, he therefore, as it were, *periſhes in his hands*. If, alſo, he adopt the former alternative, (that of paying the *fine*,) his debt is extinguiſhed; for as the ſlave was (as it were) *loſt* by the offence, the recovery of him was incumbent on the pawnee, by the payment of the atonement. Upon the pawner, therefore, diſcharging ſuch atonement, he, as it were, retrieves the ſlave, and is conſequently entitled to payment from the pawnee; for which reaſon the debt is held to be annulled. It is otherwiſe where a perſon pawns a ſlave girl who bears a child whilſt in the poſſeſſion of the pawnee; for if that child ſhould either kill a man, or treſpaſs upon any perſon's property, it is incumbent on the pawner in the firſt inſtance to make over the child in expiation for the murder, or in compenſation for the damage he may have occaſioned; as the child is not a ſubject of reſponſibility with the pawnee. If, therefore, the child be given in lieu of the blood or property, it is excluded from the contract of pawn,

but if he refuſe, they are defrayed by

accordingly, in liquidation of his debt.

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[*] The *immediate poſſeſſor* of a ſlave is in a certain degree reſponſible for his conduct.

but is not deducted from the pawnee's debt,—in the ſame manner as where it dies a natural death:—or if, on the other hand, he pay the atonement, the child in that caſe remains in pawn with its mother as before.

Rule with reſpect to the debts incurred by a pledged ſlave deſtroying the property of a *ſtranger*.

If a pledged ſlave deſtroy the property of any perſon to an *equal* or *greater* amount than his value, and the pawnee diſcharge the debt thus incurred by the ſlave, his claim upon the pawner holds good as before, in the ſame manner as where he pays a pecuniary atonement for any *offence* committed by the ſlave. In caſe, however, of his objecting to ſuch payment, the pawner is then required either to ſell the ſlave towards diſcharging of the debt, or to pay it himſelf. If he adopt the *latter* alternative, the claim of the pawnee is cancelled, in the ſame manner as explained in the example of *atonements*. If, on the contrary, he prefer the *former* alternative, and (declining to pay the debt himſelf) ſell the ſlave towards the diſcharge of it, in that caſe the perſon who ſuſtained the injury muſt firſt take what is due to him from the price, (his claim having preference to that of the pawnee,) and then, if any thing remain, enquiry muſt be made whether the claim of the proprietor of the goods was *greater*, *equal* to, or *leſs* than that of the pawnee?—If it be either *equal* to, or *greater* than the claim of the pawnee, the reſidue of the price is appropriated to the pawner, and the debt of the pawnee is held to be annulled; for upon the ſlave being ſold towards the diſcharge of a debt attaching to him in conſequence of an offence committed whilſt in the poſſeſſion of the pawnee, the caſe becomes in effect the ſame as if he had been deſtroyed in the pawnee's poſſeſſion. If, on the contrary, the claim of the proprietor be leſs than that of the pawnee, the claim of the pawnee is in that caſe annulled only in proportion to the ſum diſburſed to the proprietor; and the remainder is detained in pawn in lieu of the ſlave;—wherefore, if the pawnee's debt be at that time due, he may then take this ſum as a ſatisfaction for it; but if the term of payment ſhould not have arrived, he muſt retain it in his hands until his debt become payable. If, on the other hand, it ſhould ſo happen that the price of the ſlave does not altogether ſuffice towards the diſcharge of the proprietor's debt, he [the proprietor] may in that caſe take the whole of the price, but without making a demand on any perſon for the remainder, until ſuch time as the ſlave may have become free; for his right relates to the ſlave; and as the ſlave has been ſold towards making ſatisfaction for it, his claim therefore to whatever part of the right may not have been thus diſcharged, is ſuſpended until the ſlave obtain his freedom, when it may be again urged;—and if the ſlave, after obtaining his freedom, ſhould thus diſcharge the remainder, he is not then entitled to claim a reimburſement from any perſon, as the money he diſburſed was due from him on account of his own act.

If the value of the ſlave be twice the amount of the debt, the fines incurred by him are defrayed equally by both pa

IF a perſon pawn a ſlave valued at *two* thouſand *dirms* in ſecurity of a debt of *one* thouſand, and the ſlave commit an offence, in that caſe the pawner and pawnee muſt *both* be ordered to pay the atonement*; for a moiety only of the ſlave is inſured with the pawnee, the other moiety being with him as a *truſt*; and accordingly the atonement for the *inſured* moiety is chargeable to him, and that of the other moiety to the pawnee. If, therefore, the pawner incline to give the ſlave as a compoſition for the offence, and the pawnee aſſent thereto, his [the pawnee's] debt is extinguiſhed. If, on the contrary, the parties diſagree, (one of them inclining to give the ſlave in compoſition, and the other wiſhing to diſcharge the atonement,) the declaration is in that caſe accepted of the party who prefers paying the atonement, whether it be the pawner or pawnee; for if the *pawnee* pay the atonement, ſtill the right of the pawner is not annulled; whereas the pawner, in commuting the ſlave for the penalty, would deſtroy the right of the pawnee. If the *pawnee* pay the atonement, a part of the payment, in proportion to the part [of the ſlave] he held in *truſt*, is conſidered as *gratuitous*, (for this reaſon, that if he had not choſen to pay it, the matter would have reſted upon the *pawner*,) and ſuch being the caſe, he has no claim upon the pawner for an indemnification.—If, on the contrary, the pawnee refuſe to pay the atonement, and the pawner diſcharge the whole, a moiety of it is in that caſe placed to the account of the pawnee;—(that is to ſay, is deducted from his claim;) for as, in all caſes where pledged ſlaves commit a crime, the debt of the pawnee is held to be extinguiſhed upon the pawner either making over the ſlave, or paying the atonement, it follows that the pawner, in paying the atonement, does not act *gratuitouſly*. As, therefore, a moiety of the atonement is due from the pawnee, if ſuch moiety be equal to, or greater than his claim, the whole of his debt is extinguiſhed; or, if it be *leſs*, a proportionate part; whilſt the ſlave is detained in pawn in ſecurity of the part remaining due.

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* This does not mean that *each* is to pay the atonement, (for that would be to pay it *twice*,) but that the obligation of atoning for the offence reſts upon the *one* as well as upon the *other*.

**The executor of a deceaſed pawner may ſell the pledge, and diſcharge the debt, with the pawnee's conſent.**

If a pawner die, his executor is empowered to ſell the pledge, and diſcharge the debt, provided he obtain the conſent of the pawnee; for as the executor repreſents the pawner, he has conſequently the ſame power and privilege as had appertained to *him* during his lifetime. But if a pawner die without leaving an executor, it then belongs to the *Kazee* to appoint a perſon to act in that capacity; as it is his duty to conſerve the rights of thoſe who are themſelves incapable of maintaining them; which purpoſe is fulfilled in the appointment of an executor, who may diſcharge the debts of the deceaſed, and receive payment of his claims upon others.

**An executor**

**to**

If an executor pawn part of the effects of the defunct to one creditors, it is illegal, and the other creditors may compel to revoke the pawn;—for an executor, not having the power of paying ſome of the creditors, and of excepting others, cannot therefore give pledges to ſome and not to others; as a pledge is held to be the ſame, in effect, with an actual *payment*. If, therefore, the executor ſhould, in the mean time, diſcharge the claims of the other creditors, the pawn which he before made is valid, ſince in ſatisfying them he removes the bar to its legality. But if the defunct ſhould leave only one debt againſt him, in that caſe the executor is juſtified in pawning part of the effects in ſecurity of it; for, ſince he has a power of giving part of the effects in payment of the debts of the deceaſed, he may conſequently depoſit part of them in pledge; and if, afterwards, he ſell the pledge as a means of diſcharging the debt, it is lawful, becauſe the ſale of the effects of the defunct with a purpoſe to pay off his debts being lawful when they are *not* pawned, it is conſequently ſo likewiſe when they *are* pawned.

any particular creditor,

unleſs there be only *one*.

IF an executor take a pawn in ſecurity of a debt due to the defunct, it is lawful; becauſe the ſeizin of a pawn is the ſame as a receipt of payment; and it is the duty of an executor to receive payment of the debts of the deceaſed. (A more particular explanation of the powers of an executor, with reſpect to pawns, ſhall be given in treating of *Executorſhips*.)

He may receive pledges in ſecurity for debts owing to the defunct.

SECTION.

## SECTION.

ſtill remains in pawn after having become *wine*, and then *vi-*

If a perſon pawn, in ſecurity of a debt of ten *dirms*, a quantity of the juice of grapes of the ſame value, which afterwards becomes wine *, and then vinegar, and the value of the vinegar be alſo ten *dirms*, it in that caſe remains in pawn for the debt of ten *dirms*; becauſe whatever is fit to be *ſold* is likewiſe fit to be *pawned*, ſince *worth* is requiſite to the fitneſs in the *one* inſtance as well as in the *other*; and wine, although not at *firſt* qualified for ſale, does yet poſſeſs that fitneſs ultimately;—whence it is that if a perſon purchaſe the juice of grapes, and it become wine prior to his taking poſſeſſion, ſtill the compact of the ſale is not diſſolved; but the purchaſer has, in ſuch caſe, the option of either adhering to, or receding from the bargain; as the goods which he purchaſed, having been *changed*, are thereby as it were *damaged*.

A pledge deſtroyed *in part* is ſtill retained in pawn with reſpect to the *remainder*

If a goat, eſtimated at ten *dirms*, having been pawned for a debt of the ſame amount, ſhould afterwards die, and its ſkin be preſerved ſo as to bear a value of one *dirm*, it is detained in pawn in ſecurity of a like part of the debt; for as a contract of pawn is completed and perfected by the deſtruction of the pledge, (ſince the object of it, namely, a payment of debt, is then obtained,) it follows that where a part of the pawn remains, the contract continues in force in proportion to that part. It is otherwiſe where a goat, having been ſold, dies before the purchaſer takes poſſeſſion, and the ſkin is preſerved;

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By ſermentation. (For an explanation of this, ſee *Prohibited* for in that caſe the contract is completely void,—(that is to ſay, it does not ſubſiſt even in regard to the *ſkin*;)—becauſe ſale is rendered void, and entirely done away, by a deſtruction of the goods before the delivery of them to the purchaſer; and ſuch being the caſe, it cannot (in this inſtance) revert with reſpect to the ſkin.

EVERY ſpecies of increaſe accruing from a pledge after the execution of the contract, (ſuch as *milk*, *fruits*, *wool*, or *progeny*,) belong to the pawner, as being the offspring of his property:—but they are, nevertheleſs, detained with the original in pawn; for branches are dependant on the ſtock; and the contract of pawn, being of a binding nature, extends over all its branches. If, however, this offspring be deſtroyed in the pawnee's hands, he is not reſponſible for it; becauſe no part of the ſum oppoſed to the original is oppoſed to the *offspring*, as *that* was not originally included in the contract, ſince the propoſal and acceptance which form the contract did not relate to, or comprehend it. If, on the contrary, the *original* be deſtroyed, and the offſpring remain whole, it is incumbent on the pawner to redeem the ſame, by paying its proportionate value; that is to ſay, the debt muſt be divided proportionably to the value which the original bore at the time of concluding the bargain, and that which the offspring bears at the time of redeeming it; and the proportion given to the original is, upon the loſs of it, held to be annulled; but that of the offspring remains due, and muſt be paid by the pawnee towards the redemption of it*. (A variety of caſes are determined by this rule, ſeveral of which

Any increaſe accruing from the pledge is detained in pawn with it.

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* As this is ſomewhat obſcure, it may be proper to render it more clear, by a ſtatement of the caſe according to the rules of proportion. Suppoſe, therefore, the debt to be one hundred *dirms*, the original pledge valued at one hundred, and its offspring at fifty,—in that caſe the original and offspring, amounting to one hundred and fifty *dirms*, are pawned in ſecurity of one hundred *dirms*.—Now, in order to know the proportions of pawn which the original and the offspring reſpectively bear to the whole debt, the latter muſt firſt be multiplied by the original; and the multiple divided by the whole value of both

which are ſet forth in the *Kafáyat-al-Moontihee*; and the whole are enumerated in the *Jama Sagheer* and *Zeeadát* )

The pawnee, uſing the product from the pledge by permiſſion of the pawner, is not liable for any thing on that account.

If a perſon, having pawned a goat, deſire the pawnee to milk it, giving him, at the ſame time, permiſſion to enjoy whatever quantity he might milk, and the pawnee act accordingly, he is not liable to compenſate for the milk he may have thus conſumed, nor is his claim, on that account, in any meaſure diminiſhed, ſince he uſed the milk at the inſtance of the pawner. If, therefore, the goat die unredeemed in the hands of the pawnee, the debt owing to him muſt be divided into two parts, proportionate to the value of the goat and of the milk; and that part oppoſed to the goat is cancelled; whilſt the other part, oppoſed to the milk, remains due from the pawner; becauſe, although the milk be the property of the pawner, yet as the pawnee conſumed it by his deſire, the caſe is the ſame as if the pawner had himſelf taken and deſtroyed it. The pawnee, therefore, is not anſwerable for the milk: but [if the goat die] his claim ſtill exiſts with reſpect to that proportion which correſponds with it. The ſame rule alſo obtains with regard to the offspring of a goat, which a pawnee eats at the deſire of the pawner; and, in fine, with reſpect to every increaſe accruing from pledges poſterior to the contract.

The pledge may be augmented, but not the debt.

The augmentation of a pledge is lawful, in the opinion of all our doctors;—as where, for inſtance, a perſon, having pawned a ſlave for a debt of one thouſand *dirms*, afterwards gives the ſlave a garment to be detained likewiſe in pawn in ſecurity of the ſame debt;—in which

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both [original and offspring] and the product gives the proportion of the original; after which the ſame proceſs muſt be obſerved with reſpect to the offspring;—when the calculation will ſtand thus:

150 : 100 :: 100—66⅔ the proportion of the original pledge.
150 : 100 :: 50—33⅓ the proportion of the offspring.

caſe the addition ſo made to the original pledge is lawful, and the garment is included in the agreement; the caſe being, in ſhort, the ſame as if the ſlave and garment had been originally pawned together. On the other hand, the increaſe of a debt in ſecurity of which a pawn has been taken is not lawful, (according to *Haneefa* and *Mohammed*;) that is to ſay, the pledge oppoſed to a particular debt does not alſo ſtand oppoſed to any *increaſe* upon it. *Aboo Yooſuf* holds that *both* debts are liquidated.—The addition to a pledge, as here ſtated, is termed *Zeeàdit Kooſdee*, or *intentional* increaſe*; and the debt is to be between the value the *original* pledge bore at the time of pawning it, and that which the *addition* bears on the day of its delivery.—Hence if the value of the latter was then five hundred *dirms*, and that of the original pledge at the time of concluding the agreement one thouſand, and the amount of the debt likewiſe one thouſand, the debt is in that caſe divided into three ſhares, two of which are oppoſed to the original pledge, and the remaining one to the increaſe; and according to this proportion they are reſpectively charged for, if loſt or deſtroyed in the hands of the pawnee.

Caſe of increaſe to a pledged female ſlave.

IF a perſon, in ſecurity of a debt of one thouſand *dirms*, pawn a female-ſlave of the ſame value, who afterwards brings forth a child likewiſe eſtimated at one thouſand *dirms*, and the pawner then increaſe the pledge by the addition of a ſlave alſo valued at one thouſand *dirms*, (ſaying to the pawnee, "I have added this ſlave to the child "of the pledge,") the ſlave is in that caſe pawned with the *child* only. If, therefore, the child afterwards die, the ſlave is no longer in pawn, inſomuch that the pawner may reſume him from the pawnee without making him any return. If, alſo, the *ſlave* ſhould die, or be loſt, nothing is chargeable on that account to the pawnee.—If, on the other hand, the *mother* ſhould die, the debt muſt in that caſe be divided between the value ſhe bore at the time of concluding the contract, and that which the child bears on the day of redemption;—and ſince the ſlave was attached ſolely to the child, the ſhare of the child muſt therefore be proportionably divided between it and the ſlave, agreeably to their reſpective values, in order that if either of them ſhould die he may be charged for accordingly. If, on the contrary, the pawner attach the ſlave to the *mother*, (ſaying to the pawnee, "I "have placed him with *her* in addition to the pledge,") the debt muſt in that caſe be proportionably oppoſed to the mother and the ſlave, according to the value which they ſeverally bore at the time of ſeizin; and from the ſum oppoſed to the mother a proportionate part muſt be allotted to the child; for the pawner, in having placed the ſlave with the *mother*, joined him (as it were) to the original matter of the agreement; whence the child is included in the proportion of the *mother* only.

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* To diſtinguiſh it from *accidental* increaſe by *breeding*, *vegetation*, &c.

Caſe of a pawner com-
in pawn
*other.*

If a perſon pawn a ſlave valued at one thouſand *dirms* in ſecurity of a debt of the ſame amount, and afterwards give the pawnee another ſlave, likewiſe of the ſame value, to be detained in place of the former, in that caſe the firſt ſlave is conſidered as being in pawn until ſuch time as the pawnee reſtore him to the pawner in the way of annulment, the ſecond ſlave being merely a *depoſit* in his hands until he be regularly rendered a ſubſtitute for the other; for the firſt ſlave was included in the reſponſibility of the pawnee only becauſe of his being poſſeſſed *in ſecurity of debt*; and as both the ſeizin and the debt ſtill exiſt, the ſlave therefore continues a ſubject of reſponſibility until the ſeizin be formally voided; and ſuch being the caſe, the pawnee is not liable for the *ſecond* ſlave, as the parties intend *one* of them only to be included in the pawnee's reſponſibility:—but upon the pawnee reſtoring the firſt ſlave to the pawner, he becomes reſponſible for the ſecond.

The pawnee is not reſponſible for the pledge after

If the pawnee acquit the pawner of the debt, or beſtow it on him in gift, and the pledge be afterwards deſtroyed in his [the pawnee's] poſſeſſion, he is not reſponſible for it, according to our doctors, proceeding upon a favourable conſtruction of the LAW:—contrary to the opinion of *Ziffer*. The reaſons for a favourable conſtruction of the LAW in this particular are twofold.—FIRST, a pledge is inſured on two conditions;—*one*, that it be actually poſſeſſed by the pawnee; and *another*, that it be oppoſed to a debt either *due* or *promiſed*. Now compenſation for a pledge in the caſe of a debt then due, is made in this manner,—that if the pawn be loſt in the hands of the pawnee, his debt is extinguiſhed, provided the value of the pledge be adequate to the amount of the debt; whereas compenſation in the caſe of a *promiſed* debt is made by conſtraining the pawnee, in caſe of the decay of the pledge in his hands, to make good to the pawner the ſum he had promiſed;—and in a caſe where the pawnee acquits the pawner of the debt, or beſtows it on him in gift, the *ſecond* condition is wanting, as no debt exiſts in that inſtance either *due* or *promiſed*. SECONDLY, one object of a pawner in delivering the pledge to the pawnee is that, in caſe of its loſs, he may be abſolved from any further obligation: but where the pawnee acquits the pawner of the debt, and the pawn is afterwards loſt in his hands, the deſire of the pawner being accompliſhed, the pawnee is not therefore liable for it; (unleſs, however, the pawnee, having remitted the debt, refuſe to reſtore the pawn, and prevent the pawner from reſuming it; for in that caſe, if the pledge be loſt, he is reſponſible for the value, ſince by ſuch obſtruction he becomes an *uſurper*, as he no longer poſſeſſes a power of obſtruction.)—In the ſame manner, if a woman take a pledge from her huſband in ſecurity of her ſtipulated dower, and afterwards exempt him from the payment of it, or apoſtatize from the faith before conſummation, and the pledge be then deſtroyed in her hands, ſhe is not reſponſible for it, as the dower (like the debt) was remitted.

having acquitted the pawner of his debt.

IF a pawnee receive payment of his debt, either from the pawner or from an unconcerned perſon, in a gratuitous manner, and the pledge be afterwards deſtroyed in his poſſeſſion, his debt is in conſe-

If the
bc
wi
ter he has received pay-

re- [illegible], and the debt ſtands liquidated;

quence extinguiſhed, and it is incumbent on him to reſtore what he had received to the perſon from whom he received it, whether the pawner or any other; for the ſeizin of the pawnee is equivalent to a receipt of payment in caſe of the loſs of the pledge; and in the preſent inſtance, upon the pledge being deſtroyed, the pawnee is accounted to have received payment from the time he was firſt ſeized of it; and as he is not entitled, after that, to a *ſecond* diſcharge, and the payment he had received as above then becomes ſuch in effect, it muſt therefore be refunded.—In ſhort, the diſcharge of the pawnee's claim, whilſt he remains ſeized of the pawn, does not take place, but continues *ſuſpended* until he deliver it to the pawner; and ſuch being the caſe, the pawner is not therefore, during that time, held to be acquitted of the debt;—and upon the pledge being afterwards deſtroyed in the hands of the pawnee, his poſſeſſion of it under ſuch a circumſtance is, in effect, *a receipt of payment*, and the other payment received whilſt he was in poſſeſſion of the pledge is annulled and done away, for otherwiſe a *repetition* of diſcharge would be induced;—for which reaſon he muſt refund the money he received in payment,—and alſo for *this* reaſon, that if he were not to refund it the intent of the pawner would be defeated.

and ſo likewiſe, if he

If a pawnee purchaſe ſome ſpecific article from the pawner in lieu of his debt, or *compound* the debt with him for ſome ſpecific article; and the pawn be afterwards loſt in his poſſeſſion, he is ſtill reſponſible, and may therefore be compelled to reſtore the article which he had either received in purchaſe or compoſition; for the ſeizin of that article, in either caſe, is equivalent to an acceptance of payment; and conſequently, if he do not refund it, a double receipt of payment is induced, as mentioned in the preceding example.

(with concurrence) tranſ-

If a pawner transfer the debt which he owes the pawnee upon another perſon, (ſuch as *Zeyd*, for inſtance,) who agrees to pay the ſame, and the pawnee, having aſſented to ſuch transfer, acquit the pawner of the debt, and the pledge be afterwards deſtroyed in the pawnee's hands, the transfer is thereby rendered ineffectual, and the claim of the pawnee is annihilated; for although, in conſequence of the transfer, the transferrer [the pawner] be acquitted of any further concern in the matter, yet this acquittance is the ſame as an actual payment, inaſmuch as the ſum, the payment of which he had tranſferred upon the other perſon, is ultimately diſburſed by him, he having ſo transferred it in conſequence of his having a claim upon the transferee for a like ſum, whence the payment is made from him *in effect*;—or, if that perſon was *not* indebted to him, ſtill the pawner muſt afterwards repay whatever ſum he may have diſburſed in conſequence of the transfer, as in that caſe he acted in the capacity of an agent on his behalf.

fer the debt upo perſ

IF a perſon pawn any thing into the hands of another, and both parties afterwards concur in ſaying that no debt had ever ſubſiſted between them, and the pledge be then deſtroyed in the hands of the pawnee, it is anſwered by the debt; in other words, the debt in ſecurity of which the thing had been pawned is extinguiſhed;—for there is ſtill a probability of the debt being eſtabliſhed by the parties at ſome future period concurring and agreeing that it *did* exiſt; whence it is poſſible that the debt may be claimed,—a circumſtance which cannot happen in a caſe of *acquittal* of debt.

If the pl be loſt after the parties agreeing that *no debt had exiſted*, it ſtands as a diſcharge of the ſuppoſed debt.

# *HEDAYA.*

## BOOK XLIX.

## Of *JANAYAT*, or OFFENCES againſt the PERSON.

*JANAYAT*, in the language of the LAW, is a term expreſſive of any prohibited act committed either upon the *perſon* or *property*:—in the practice of lawyers it ſignifies that prohibited act committed upon the *perſon* *, which is called *murder*, or upon a part of the body, which is termed *wounding* or *maiming*.

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* Arab. *Zat*, ſignifying the body connected with the ſoul; in oppoſition to *Badn*, which means ſimply the *material* body. The tranſlator renders it *perſon* or *life*, as beſt ſuits the context.

Chap.

Chap. I. Introductory.
Chap. II. Of what occaſions Retaliation.
Chap. III. Of Retaliation in Matters ſhort of *Life*.
Chap. IV. Of Evidence in Caſes of *Murder*.
Chap. V. Of the Circumſtances under which *Murder* takes place.

## CHAP. I.

Homicide

THE homicide of which the LAW takes cognizance is of five kinds; I. *Katl-amd*, or wilful murder; II. *Shàbbàh-amd**, or manſlaughter; III. *Katl-khotà*, or homicide by miſadventure; IV. *Katl-kàyem-mokàm-bà-Khotà*, or homicide of the ſame nature as that by miſadventure; and V. *Katl-ba-Sibbab*, or homicide by an intermediate cauſe.

I. W *murder*;

KATL-AMD, or wilful murder, is where the perpetrator maliciouſly kills a man with a weapon, or ſomething that ſerves for a weapon, ſuch as a club, a ſharp ſtone, or fire; becauſe *amd* means *intentionally*, or *wilfully*; and as the intention is a thing concealed, which we cannot diſcover but by inference from ſomething affording an argument of it, and the uſe of an *inſtrument* of murder does afford ſuch argument, it may be concluded, where ſuch an inſtrument is uſed by the ſlayer, that murder was his intention.

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* This is a technical phraſe ſignifying, literally, "*the ſemblance of wilful:*"—the tranſlator expreſſes it by the term *manſlaughter*, on the authority of SALE, (ſee his Introductory Diſcourſe, ſect. VI.) and alſo, as being the moſt analogous term in our language.

which is *criminal*, and ſubjects the offender to retaliation.

If a perſon commit wilful murder, two points are eſtabliſhed. I. that the murderer is a *criminal*; becauſe it is ſaid in the Koran, "Whoever slayeth a believer, his reward is hell;" and the ſame is repeatedly mentioned in the traditions; and all authorities, moreover, concur in this point. II. that the murderer is—liable to retaliation; becauſe the Koran ſays, "It is incumbent "on you to execute retaliation upon murderers,"—by whom is to be underſtood perſons guilty of *wilful murder*, as it is ſaid in the traditions, "*Wilful murder requires retaliation.*"—An offence is, moreover, rendered complete by the *intention*, and complete puniſhment (underſtood by retaliation) is incurred where that exiſts, but otherwiſe not. In ſhort, retaliation is incurred in a caſe of wilful murder, except where the heirs * of the murdered perſon either forgive or compound the offence, retaliation being their right. It is proper, alſo, to obſerve, that retaliation is the appointed penalty in this inſtance; and the heir is not at liberty to commute it for a fine, but with the conſent of the murderer. This is likewiſe one opinion of *Shafei*. He however ſays, that the heir is at liberty to remit the retaliation, and exact a ſum in lieu of it, without the murderer's conſent; for as this occaſions his releaſe from deſtruction, it is conſequently lawful independant of his will. Another opinion of his is, that one of two things is incurred, without any particular appointment or ſpecification of either,—namely, retaliation, or fine; and that this determination reſts with the heir,—(that is, one or other becomes determined, according to his choice;) becauſe the LAW endows the individual with a right for the reparation of his injuries; and the injury, in the preſent inſtance, is repaired either way. The arguments of our doctors in ſupport of the former opinion are twofold. FIRST, what has been already quoted from the KORAN and the traditions.—SECONDLY, property is incapable of being a recompence for murder, ſince between *property* and a *man* there is no equality or compariſon,—whereas retaliation poſſeſſes this capacity, becauſe of the equality between the perſons of the murdered and the murderer;—and it is, moreover, advantageous to the living, ſince by the execution of a murderer men are deterred from committing this offence.

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* Arab. *Awleya*, plural of *Wallee*. This term has a multitude of meanings, as has been already repeatedly obſerved. In the preſent inſtance it ſignifies the *next of kin*, or other perſons entitled to exact retaliation, as is more fully explained in treating of the *levying of fines*. The term *heir*, although not ſtrictly literal, is adopted as being the moſt analogous for the convenience of the Engliſh reader.—*Wallee-ad-dam* is for the ſame reaſon rendered *avenger of blood*.

THERE is no *expiation*, in a caſe of wilful murder, according to our doctors. *Shafeï* maintains that expiation alſo is incumbent*; for as the neceſſity for expiation is ſtill more urgent in a caſe of *wilful* murder than in a caſe of homicide by miſadventure, it follows that in the former inſtance it is incumbent *a fortiori*. The argument of our doctors is that wilful murder is a peculiarly heinous offence; and as expiation bears the property of an act of piety, the performance of it is not to be annexed to an offence of that deſcription. Expiation, moreover, is appointed by the LAW in attonement for the *ſmaller* offence, namely, homicide by miſadventure; and it does not hence follow that it is appointed in atonement for the *greater* offence alſo, namely, *wilful murder*.

**and excludes him from in-**

ONE effect of wilful murder is that the murderer is excluded from being heir to the murdered perſon; for, in the traditions, it is ſaid, "*There is no inheritance to the murderer.*"

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* That is, beſides the *fine*,—ſuppoſing retaliation to be remitted in lieu of a fine; for where retaliation is executed, expiation is out of the queſtion.

II. *Manſlaughter;*

SHABBAH-AMD, or manſlaughter, according to *Haneefa*, is where the perpetrator ſtrikes a man with ſomething which is neither a weapon nor ſerves as ſuch. The two diſciples and *Shafei* maintain that if the ſtroke be given with a large ſtone, or a club, the act amounts to wilful murder. *Shabbah-amd*, or manſlaughter, on the contrary, (according to the two diſciples,) is where a perſon ſtrikes another with ſomething of a nature not likely to produce death, ſuch as a *ſmall ſtick*. For as, in this caſe, the property of *wilful*[*], in the act, is defective, (inaſmuch as the perpetrator here uſes an inſtrument not of a mortal kind, the intention being ſomething elſe than death, namely, *inſtruction*, or ſo forth,) it follows that killing a perſon with ſuch an inſtrument is merely a *ſemblance* of wilful murder;—whereas the property of *wilful* is not defective in caſe of a man ſtriking another with an inſtrument of a nature to produce inſtant death, ſuch as a *great ſtone*,—for here the intention can only be to kill, as well as with a ſcimitar;—this, therefore, is wilful murder, and occaſions retaliation. The argument adduced by *Haneefa* is a ſaying of the prophet, "*Killing with a rod or ſtick is not* MURDER, *but only* MANSLAUGHTER[†], "*and the fine for it is one hundred camels.*" Another argument is, that as the inſtruments in queſtion are not commonly uſed with a view to *kill*, (whence it is that the property of *wilful* is defective therein, conſidering the inſtrument uſed,) killing, therefore, with ſuch inſtruments amounts only to manſlaughter, in the ſame manner as killing with a rod or a ſmall ſtick.

which is alſo criminal; requires expia-

MANSLAUGHTER is ſinful, the perpetrator having ſtruck intentionally, and killed, although without deſign; and it requires expiation, becauſe of the ſemblance it bears to homicide by miſadventure. An heavy fine is alſo due from the *Akilas* of the ſlayer, becauſe of the analogy this offence bears to homicide by miſadventure; for it is a rule that in all caſes where the fine* is due for bloodſhed at the firſt, and not on account of any ſupervenient or involved matter, it falls upon the *Akilas*, as being connected with homicide by miſadventure. The reſtriction, in this particular, to "*at the firſt*," is in order to diſtinguiſh this from the fine incurred on account of ſome other matter, and not on account purely of the *bloodſhed*;—as where, for inſtance, a father wilfully kills his ſon, in which caſe the fine falls immediately upon the murderer, and not upon his *Akilas*,—for here retaliation is incurred at the firſt, prior to fine, but is commuted for a fine out of reverence to the parent;—or where one of the heirs of a perſon wilfully murdered forgives the offence, in which caſe the other heirs are entitled to the fine;—or where the heirs of a perſon wilfully murdered enter into a compoſition for the fine;—for in all theſe inſtances the fine is due from the property of the murderer, and does not fall upon his *Akilas*, as not having been due *at the firſt*.

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[*] The term *qmd* [wilful] is uſed, in the *Muſſulman* law, in a ſenſe analogous to the *malicium* of the *Roman* law.

[†] Literally, "*is merely* SHABBAH-AMD;" in other words, "*is merely a* SEMBLANCE "*of* WILFUL [*murder.*] Where technical terms, of a nature not to bear tranſlation, occur ſo frequently, ſome liberties muſt neceſſarily be taken with the text.

tion; ſubjects the *Akilas* of the murderer to the payment of a heavy fine,

In conſequence of manſlaughter an heavy fine is due from the *Akilas* [of the perpetrator,] payable within three years; becauſe it is recorded of *Omar* that he thus ordained in ſuch caſes. (The meaning of an *heavy* fine ſhall be preſently made appear.)

(payable within three years;)

One effect of manſlaughter is that it excludes the ſlayer from inheriting to the ſlain, this being the proper recompence of bloodſhed. The *doubt*, moreover, which obtains in this ſpecies of bloodſhed occaſions a remiſſion of retaliation, but does not prevent an excluſion from inheritance.

and excludes the manſlayer from inheritance.

* Always meaning (throughout this book) the *Deyit*, or *fine*

III. *Homicide by miſadventure ;*

The error which occaſions *Katl Khota*, or *homicide by miſadventure*, is of two kinds; I. error in the *intention*; II. error in the *act.*—Error in the *act* is where a perſon intends a particular act, and another act is thereby occaſioned;—as where, for inſtance, a perſon ſhoots an arrow at a *mark*, and it hits a *man.*—Error in the *intention*, on the other hand, is where the miſtake exiſts, not in the *act*, but with reſpect to the *ſubject*;—as where, for inſtance, a perſon ſhoots an arrow at a *man*, ſuppoſing him to be *game*; or at a *Muſſulman*, under the ſuppoſition of his being a *hoſtile infidel*;—for here the perſon who ſhoots intends to hit the object, but errs in his intention, as not knowing what that object is.

which requires expiation; ſubjects the *Akilas* to a fine (payable in three years;)

Homicide by misadventure requires two things; expiation, (performed by emancipating a *Muſſulman* ſlave, or elſe faſting for two months ſucceſſively,) and the payment of a fine from the *Akilas* [of the ſlayer] within three years; becauſe God has ſaid, in the Koran, "Whoso killeth a believer by mistake, *(the penalty of it* "*is)* the freeing of a believer, and a fine to the fa-"mily *(of the ſlain*;"*)*—and the fine is payable within *three* becauſe of the determination of *Omar*, as before mentioned.

is criminal *in a certain degree ;*

Homicide by misadventure does not bear the criminality of wilful bloodſhed. Still, however, it is not altogether exempt from criminality; for as the ſlayer neglected caution, and acted haſtily in ſhooting his arrow, he is criminal ſo far as *having neglected caution.*—Beſides, if the act were not criminal, expiation for it would not have been ordained, as expiation is ordained in atonement for crimes.

and excludes the offender from inheritance.

Homicide by misadventure occaſions the ſlayer's excluſion from inheriting to the ſlain; becauſe it is an offence for which excluſion from inheritance is the due recompence.

(A blow with an intention

If a perſon ſtrike at any part of another, with intention to *wound* him, and hit another part, and the perſon ſtruck die in conſequence of the wound, retaliation is incurred; becauſe this is not *homicide by miſadventure*; for here the bloodſhed is a conſequence of an intention againſt a certain part; and all the parts of the body are as a ſingle ſubject.

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*wilful mur-*

HOMICIDE of the *fourth* deſcription (namely, that which is of the *ſame nature* as homicide by miſadventure*) is where, for inſtance, a perſon walking in his ſleep falls upon another ſo as to kill him by ſuch fall; and it is ſubject to the ſame rules with homicide by miſadventure.

IV.

*ture.*

HOMICIDE BY AN INTERMEDIATE CAUSE is where, for inſtance, a perſon digs a well, or ſets up a ſtone, in ground which does not belong to him, and another falls into the well, or over the ſtone, and dies;—in conſequence of which a fine is due from the *Akilas*; becauſe the digging of the well, or placing the ſtone, was the occaſion of the deceaſed's deſtruction; and as the perſon who dug the one or ſet up the other was guilty of a tranſgreſſion in ſo doing, the caſe is in fact the ſame as if he had himſelf thrown the deceaſed into the well or againſt the ſtone. A fine is therefore incumbent in this inſtance.

V. *Homicide by an intermediate cauſe*

which ſubjects the offender's *Akilas* to a fine,

EXPIATION is not incumbent in this ſpecies of *homicide*, nor is the guilty perſon excluded from inheriting [to the perſon killed.] *Shafeï* alleges that *homicide by an intermediate cauſe* is connected with *homicide by miſadventure*, with reſpect to all its effects, the lawgiver having accounted the guilty perſon, in this inſtance, to be equally a *ſhedder of blood*. The argument of our doctors is that as, in this caſe, the bloodſhed has not *actually* proceeded from the offender, the fact is therefore connected with homicide merely with reſpect to a *compenſation*, continuing, ſo far as concerns other matters, ſubject to its own rules.

but does not require expiation, nor exclude from inheritance.

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* This diſtinction might perhaps be with propriety rendered *accidental* homicide.

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although the offender.

The digger of the well, or ſetter-up of the ſtone*, is an offender becauſe of theſe acts,—that is, becauſe of digging the well, or ſo forth, *in land not his own property*, and not becauſe of the death thereby occaſioned,—according to the opinions of the learned. Homicide by an intermediate cauſe, therefore, does not require expiation; nor does it exclude from inheritance, (as has been already mentioned,) becauſe ſuch excluſion is a penalty annexed to the actual *offence of* which does not here exiſt.

General rule in offences of life.

Whatever has the *ſemblance* merely of a wilful act, where life is affected, amounts to *wilful* in any thing *ſhort* of life; becauſe the deſtruction of life bears a different conſtruction according to the inſtrument by means of which ſuch deſtruction is produced;—whereas the deſtruction of a *limb* or *member* does not bear any difference of conſtruction from that circumſtance; for by *bloodſhed* is underſtood an act by which the vital principle is extinguiſhed; and the vital principle is not a matter of a palpable nature,—nor can the intention of deſtroying it be diſcovered but from the uſe of ſome mortal weapon; whereas a *limb* or *member* being a palpable thing, the inſtrument uſed in deſtroying it does not occaſion any difference in the conſtruction of the act by which it is deſtroyed. Beſides, if an inſtrument of manſlaughter (ſuch as a *rod)* be uſed with an intention to kill, the act is *murder*,—whereas if it be uſed merely with a view to *correction*, and produce death, it is only *manſlaughter*; but theſe diſtinctions do not exiſt in any matter ſhort of life, ſince in the ſame manner as the deſtruction of a member may be intended by the uſe of a weapon, ſo may it likewiſe by the uſe of any thing elſe; for as an eye (for inſtance) may be put out by a weapon, ſo likewiſe may it by a ſmall rod; and conſequently the act is equally *wilful* in either inſtance.

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* In the public highway, which may be an intermediate cauſe of homicide, by occaſioning the death of a paſſenger. (This ſubject will be diſcuſſed at large in the next book, under the head of *Nuiſances.)*

# CHAP. II.

## Of what occaſions Retaliation.

Retaliation is · · perſon of protected blood.

RETALIATION is incurred by the killing of a perſon whoſe blood is under continual protection [*], where the perpetrator ſlays him *wilfully*. The reaſon for ſtipulating that the act be *wilful* has been already explained; and it is alſo a condition that the perſon ſlain be one whoſe blood is under *continual* protection, in order that the doubt with reſpect to the neutrality of his blood may be removed, and an equality certified [between the ſlayer and the ſlain,] as equality is the point upon which retaliation turns.

A freeman is ſlain for a ſlave the property of another;

A FREEMAN is ſlain for a freeman;—and alſo for a ſlave the property of another, the argument for retaliation being univerſal, as was before explained. *Shafeï* maintains that a freeman is not to be ſlain for a ſlave; becauſe GOD has ſaid, in the KORAN, "THE FREE "SHALL DIE FOR THE FREE, AND THE SERVANT FOR THE SER"VANT;" and alſo, becauſe retaliation reſts upon equality, which does not exiſt between a freeman and a ſlave,—whence it is that the limb of a freeman is not ſtruck off for the limb of a ſlave:—in oppoſition to a *ſlave for a ſlave*, as theſe are on a perfect equality; and contrary, alſo, to the caſe of ſlaying a ſlave for a freeman, for here the defect is on the part of the ſlayer, which is no obſtacle to retaliation; as where, for inſtance, a paralytic perſon murders one in perfect

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[†] Such as a *Muſſulman* or a *Zimmee:* in oppoſition to aliens, who have only an *occaſional* and *temporary* protection.

health, in which caſe he is ſlain in return. The argument of our doctors is, that retaliation reſts merely upon equality in point of protection to the blood; (in other words, it depends upon the blood of *both* parties being in perpetual protection, and never in a neutral ſtate;) and accordingly a perſon in health is put to death for a valetudinarian, an adult for an infant, and a maniac for one in his perfect ſenſes;—becauſe both parties are upon a footing in point of protection. Now this protection is a conſequence either of religion or country; and as a ſlave and a freeman are both equally in theſe reſpects entitled to it, a freeman may therefore be put to death for a ſlave.

and a *Muſſul-* for a *Zimmee.*

A MUSSULMAN is put to death for a *Zimmee. Shafeï* maintains that a *Muſſulman* is not to be put to death for a *Zimmee*; becauſe the prophet has ſaid, "*A* MUSSULMAN *is not to ſuffer death for an infidel*;" and alſo, becauſe there is not a perfect equality between the parties at the time of the offence, GOD having ſaid, "*Infidels are not the equals of believers*;" and alſo, becauſe as infidelity puts the blood out of protection, there is in this inſtance a doubt concerning its neutrality, preventive of retaliation. The arguments of our doctors upon this point are twofold.—FIRST, it is recorded of the prophet, that he once ſlew a *Muſſulman* for a *Zimmee.*—SECONDLY, an equality muſt neceſſarily be eſtabliſhed on the part of the *Zimmee* with reſpect to protection of blood, when we conſider the circumſtance of country, and the duties of life; for if his blood were not protected, it would be impoſſible for him to diſcharge the various duties required of him as a member of the community. With reſpect, moreover, to what is advanced by *Shafeï*, it may be replied, that by the infidelity which puts the blood out of protection is to be underſtood the infidelity of an *hoſtile* unbeliever, as *thoſe* are the infidels who hold enmity with *Muſſulmans*, and not *Zimmee* infidels. The rule, moreover, of retaliating upon a *Zimmee* for a *Zimmee* affords an argument that the infidelity of a *Zimmee* does not occaſion any doubt with regard to the protection of his blood, ſince if this were a matter of doubt, a

*Zimmee* would not be ſlain for a *Zimmee*. Beſides, by the term *infidels* (in the ſaying of the prophet adduced by *Shafeï*) muſt be underſtood *Mooſtâmins*, or *protected* infidels, as appears from what the prophet further ſaid, (in the ſame tradition,) "*A* ZIMMEE *is not to be* "*ſlain for an* INFIDEL," (meaning a *Mooſtâmin*.)

A *Muſſulman* is not ſlain for a *Mooſtâmin*;

A MUSSULMAN is not to be ſlain for a *Mooſtâmin*, as the blood of a *Mooſtâmin* is not in a continual ſtate of protection,—and his infidelity is, moreover, an occaſion of hoſtility, ſince a *Mooſtâmin* ſtill entertains an intention of returning to his own [an hoſtile] country. Neither is a *Zimmee* to be ſlain for a *Mooſtâmin*, becauſe of the tradition of the prophet before noticed.

nor one *Mooſtâmin* for another.

ANALOGY ſuggeſts that a *Mooſtâmin* is to be ſlain for a *Mooſtâmin*, both being upon a footing. The benevolence of the law, however, determines that one *Mooſtâmin* is not to be ſlain for another; becauſe here the infidelity which occaſions *enmity* exiſts with reſpect to the parties; and as that puts the blood out of protection, there is therefore a doubt with reſpect to its being protected ſufficiently to prevent retaliation.

A *man* is ſlain for a *wom*[illegible] and the [illegible] for the [illegible]

A MAN is ſlain for a woman, an adult for an infant, and a ſound perſon for one who is blind, infirm, diſmembered, (that is, deprived of an *eye* or a *limb*,) lame, or inſane; becauſe the argument of retaliation is univerſal; and if regard were paid to a diſparity in thoſe particulars, as well as in point of protection to the blood, retaliation would be in a great meaſure prevented, and contention and bloodſhed would conſequently prevail among mankind.

The parent is not ſlain for the child,

A FATHER is not to be ſlain for his child; becauſe the prophet has ſaid, "*Retaliation muſt not be executed upon the parent for his off*-"*ſpring*;" and alſo, becauſe, as the parent is the efficient cauſe of his child's exiſtence, it is not proper that the child ſhould require or be the occaſion of his death;—whence it is that a ſon is forbidden to ſhoot at his father when in the army of an enemy, or to throw a ſtone at him when ſuffering lapidation for whoredom. All the anceſtors, whatever be their character or degree, are included in this rule; and ſo likewiſe the mother, grandmothers maternal or paternal, and all other *female* anceſtors, however remote; becauſe of the argument for retaliation being univerſal, as was above obſerved.

but the child is ſlain for the parent.

A CHILD is ſlain for the parent, as the reaſon for retaliation here exiſts, and there is no reaſon why it ſhould be remitted.

A maſter is not ſlain for his own or his child's ſlave,

A MASTER is not ſlain for his ſlave, nor for his *Modabbir* or *Mokâtib*, nor for the ſlave of his child;—becauſe, if retaliation were due in thoſe inſtances, it muſt be ſo at the requiſition either of the maſter himſelf, or of his child *, the one of which is abſurd, and the other inadmiſſible.

nor for a ſlave

IF one of two partners in a ſlave kill ſuch ſlave, retaliation is not incurred; becauſe it fails in the proportion of this partner's right in the ſlave, the avenger of the blood being, with reſpect to that part, the murderer himſelf; and as it thus fails *in part*, it muſt neceſſarily fail *in toto*, ſince retaliation does not admit of being inflicted in *part* only.

a *pa-*

IF a perſon inherit the right of retaliating upon his parent, the retaliation fails, and is remitted, becauſe of the reverence due to paternity.

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* The maſter of a ſlave, being his *Mawla*, is the only perſon entitled to demand ſa- for his blood.

It muſt be executed with a mortal weapon.

RETALIATION is not to be executed but with ſome mortal weapon *. *Shafeï* maintains that we muſt execute upon the murderer the very act he committed upon the murdered, provided it be ſuch as is ſanctioned by the LAW: if, therefore, this be done, and the murderer in conſequence die, it is well; but if not, his throat muſt then be cut with a ſcymitar. For inſtance;—if a perſon wilfully ſtrike off the hand of another, and the diſmembered perſon die in conſequence of the wound, the hand of the murderer muſt firſt be cut off in retaliation, and if he die within the ſame time after as the deceaſed, it is well; but if not, he muſt then be put to death. If, on the contrary, a perſon produce the death of another by ſome act not ſanctioned in the LAW, (ſuch as by laying hold of the hands, and pouring poiſon down the throat,—or by coition with an immature infant,) retaliation is to be executed by putting to death; and this according to all authorities.—The argument advanced by *Shafeï*, in ſupport of his opinion as above, is that retaliation reſts upon a perfect equality in all particulars, which requires that there be inflicted on the murderer the very ſame act that he committed upon the deceaſed. The arguments adduced by our doctors in ſupport of the contrary opinion are twofold;—FIRST, a ſaying of the prophet, "*There is no retaliation but* "*with a ſcymitar,*"—(meaning a *ſword*, as is underſtood by all the companions.) SECONDLY, according to what *Shafeï* advances, it follows that, where the exacter of retaliation executes upon the murderer the ſame act that he had committed on the deceaſed, and the end is not thereby anſwered, and he then puts him to death, he takes more than he is entitled to, a thing which muſt be carefully avoided; as where, for inſtance, a perſon wilfully breaks a bone of another, in which caſe retaliation in any ſhape does not follow, becauſe of the apprehenſion of the exacter taking more than his right; an apprehenſion which applies equally in the preſent inſtance.

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* That is, with a *ſharp* inſtrument, ſuch as is proper to inflict a wound.

Caſes of re-

If a perſon wilfully murder a *Mokâtib*, who has no heir but his maſter, and leaves effects ſufficient to diſcharge his ranſom, the maſter is entitled to exact retaliation, according to the two *Elders*. —*Mohammed* ſays there is no retaliation in this inſtance; becauſe here the exiſtence of the ground or cauſe for taking retaliation is dubious, and unaſcertained; for the cauſe thereof is *Willa*, ſuppoſing the *Mokâtib* to have died *free*, or, right of property in his perſon, ſuppoſing him to have died a *ſlave*,—(as the companions have differed concerning the point whether a *Mokâtib*, under the circumſtances above deſcribed, died a *ſlave* or *free*, ſome deciding one way, and ſome another;)—and the cauſe for taking retaliation being thus doubtful, and unknown, it cannot be exacted.—The argument of the two *Elders* is that the right of taking retaliation undoubtedly appertains to the maſter, for two reaſons, namely, *Willa*, and right of property in the perſon; and as the effect of each is the ſame, (namely, the taking of retaliation,) the difference in the cauſes cannot occaſion either a diſpute, or a difference in the effect; neither is any regard paid to ſuch a difference.—The difference above urged, therefore, does not prevent retaliation.

If a perſon wilfully murder a *Mokâtib*, who leaves effects ſufficient to diſcharge his ranſom, and has other heirs beſides the maſter, retaliation is not incurred on behalf either of the maſter or his heirs, although both ſhould unite in demanding it; becauſe here the perſon entitled [to retaliation] is dubious and unaſcertained, the *maſter* being the entitled perſon, if the *Mokâtib* died a *ſlave*, and the *heirs*, if he died *free*, as before mentioned.—It is different in the preceding caſe, for there the perſon entitled is ſpecific and determinate, namely the *maſter*.

If a perſon murder a *Mokâtib*, who does not leave effects ſufficient to diſcharge his ranſom, retaliation is incurred on behalf of the maſter, according to all; becauſe here the *Mokâtib* undoubtedly dies a *ſlave*, as the contract of *Kitàbat* is broken from his inability to diſcharge the ranſom. It is otherwiſe with reſpect to a ſlave emancipated in part:—in other words,—if one of two partners in a ſlave emancipate his ſhare, and emancipatory labour be, conſequently, due from the ſlave for half his value, and a perſon kill him before he has diſcharged it, he leaving no effects wherewith to make ſatisfaction for ſuch labour,—ſtill retaliation is not incurred on behalf of the emancipating partner; becauſe, as the partial manumiſſion is not diſſolved or broken by the ſlave's inability to perform the labour, a right in the whole of him does not appertain to the maſter.

or of a *pawned* ſlave.

IF a pawned ſlave be murdered whilſt in the poſſeſſion of the pawnholder, retaliation is not to be executed until the pawner and pawnholder unite in demanding it;—becauſe, as the pawnholder is not the ſlave's *maſter*, he is conſequently not entitled to the retaliation; and if the pawner alone exact the retaliation, the right of the pawnholder, in the debt due to him, is deſtroyed.—It is therefore determined that both muſt unite in taking the retaliation, as in ſuch caſe the pawnholder's right is done away by his own conſent.

Retaliation app to a be executed by the *father*,

IF a perſon be ſlain whoſe heir [*Wallee*] is an infant or an ideot, it belongs to the father of the infant or ideot to execute retaliation upon the murderer; becauſe the taking of retaliation is the right of him who is endowed with the guardianſhip of the perſon entitled to it, retaliation having been ordained on account of a matter in which guardianſhip is intereſted, namely, *ſatisfaction to the mind*;—and hence the infant's or ideot's right to retaliation appertains to the father, in the ſame manner as the right of contracting them in marriage.—It is otherwiſe, however, with reſpect to a *brother* or *uncle*, although they alſo be endowed with the right of contracting the infant or ideot in marriage; for as the father's tenderneſs is *complete*, inſomuch that he regards the intereſt of his child in preference even to *his own*, his exacting

acting the retaliation on account of his child is the ſame as the child himſelf exacting it; which is not the caſe with a brother or uncle, whoſe tenderneſs is of a defective nature, they preferring their own intereſt to that of their brother or nephew,—whence in committing the right to them, the intereſt of the infant or ideot is not to a certainty purſued.—Beſides, the executing of retaliation is an act which cannot be afterwards undone; in oppoſition to marriage, which may be undone.—They, therefore, are not empowered to take retaliation.

who is alſo at liberty to commute it for a fine.

THE father of an infant or ideot is empowered to compound retaliation for a fine, on their behalf, this being advantageous to them:—but he is not empowered to remit the retaliation gratuitouſly, as this would be deſtructive of their right.

IF a perſon wilfully ſtrike off the hand of an infant or ideot, the father of ſuch infant or ideot may either ſtrike off the hand of the offender, in retaliation, or compound the matter for a fine,—for the reaſons already mentioned.

The power, in this par- , of

A GUARDIAN appointed by will* is the ſame as a father, with reſpect to all the points above mentioned,—except retaliation by ſlaying; for he is not entitled to put the murderer to death, as he has no power over his life, and the taking of retaliation is an effect of power over life.—From this (it is to be obſerved) we may infer that the guardian in queſtion is at liberty to enter into compoſitions for a fine in lieu of life, and alſo to take retaliation in all matters *ſhort* of life, nothing being excepted beyond actual *ſlaying*.—It is indeed aſſerted, in the treatiſe on *Compoſitions*, that an appointed guardian is not at liberty to compound life for property; for as this is an act with reſpect to life, being an acceptance of a return for life, ſuch compoſition is equivalent to taking retaliation;—and as the one is not allowed to an appointed guardian, ſo neither is the other.—The reaſon, however, for what we have mentioned above, is that the end, in compoſition, is *property*, which is rendered obligatory by an engagement with an appointed guardian, in the ſame manner as with a father. It is otherwiſe in retaliation; for the end, in that, is purely revenge, and ſatisfaction to the mind, which are reſtricted alſo to the father, as he, becauſe of his near relation, and tender affection, is the ſubſtitute of his child with reſpect to them.—Lawyers have obſerved that, according to analogy, an appointed guardian is not empowered to exact a retaliation *ſhort* of life, any more than a retaliation which extends to life; becauſe the end, in both, is the revenge and ſatisfaction already mentioned:—but that, according to a more favourable conſtruction of the law, he is ſo empowered; becauſe the parts of the body are equivalent to *property*, as having been, like property, created for the ſupport and preſervation of life; and hence the exacting of a retaliation ſhort of life is merely equivalent to an act with reſpect to property.

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* Arab. *Waſee*.—It alſo ſignifies (more literally) an *executor*.—It is here uſed in oppoſition to a *natural* guardian.

Caſe of a murdered perſon leaving ſeveral heirs, ſome infants, and ſome adults.

If a perſon murdered leave heirs, ſome infants, and ſome adults, according to *Haneefa*, the adult heirs are entitled to put the murderer to death.—The two diſciples, on the contrary, maintain that they are not entitled to ſlay the murderer until ſuch time as the infant heirs attain maturity; becauſe retaliation is a right equally participated in by all the heirs; and it is impoſſible for the adult heirs to take their right, (namely, *part* of the retaliation) as retaliation is indiviſible; and if they take it *in toto*, the right of the infant heirs is deſtroyed.—A delay is therefore indiſpenſable until the infant heirs become of age;—in the ſame manner as where a right of retaliation is poſſeſſed by two men, and one of them is abſent,—in which caſe the one who is preſent cannot exact the retaliation until the abſentee be alſo preſent;—or, as where a ſlave held in partnerſhip between an infant and an adult is murdered,—in which caſe the adult cannot take retaliation until the infant have attained maturity.—The argument of *Haneefa* is that retaliation is not divided; for retaliation is eſtabliſhed on behalf of relationſhip, which is not of a diviſible nature, ſince if a man have two brothers (for inſtance,) a complete relationſhip belongs to each,—not one half to one and one half to the other; and there is, moreover, no room, for the preſent, to apprehend that the infant might grant the murderer a pardon, ſince to that he is incompetent during his minority.—The right of taking retaliation is therefore eſtabliſhed to each *in toto*, in this way, that each is (as it were) diſtinct and ſeparate,—in the ſame manner as guardians in marriage, each of whom poſſeſſes a power to contract the ward in marriage independent of the others, and as if no other exiſted.—It is otherwiſe where retaliation is divided between two adults, one of whom is abſent;—for here exiſts the apprehenſion of a preſent pardon from the abſentee.—With reſpect to the caſe of two partners in a ſlave, adduced by the two diſciples, *Haneefa* does not admit it as any objection, ſince (according to him) in this caſe alſo the adult maſter is entitled to exact the retaliation.

Retaliation is incurred from killing by a [illegible] with the [illegible] of a [illegible] &c. but not with the *ſhaft*.

If a perſon ſtrike another with a *ſpade*, or *ſhovel*, and the perſon ſtruck die in conſequence, and the blow have been given with the *iron* part of ſuch ſpade or ſhovel, the murderer is liable to be put to death.—If, on the contrary, the blow have been given with the *wooden* part [the handle or ſhaft], he is reſponſible for a fine; becauſe he has ſlain a perſon of protected blood; and as retaliation is in ſuch caſe forbidden, the fine is due, in order that the blood may not be ſhed without penalty.—Our author here remarks that the murderer, in the former inſtance, is liable to be put to death only when he ſtruck with the *edge* of the iron part, as by this alone a *wound* (which demands retaliation) can be inflicted; and that if he have ſtruck with the *back* of the inſtrument, not with the *edge*, there is a difference of opinion among our doctors,—the two diſciples holding that in this inſtance alſo he is liable to ſuffer death, as regard is paid ſolely to the uſe of an inſtrument of murder, which here exiſts,—and *Haneefa*, on the contrary, maintaining that he is not liable to death, as retaliation is not incurred unleſs a *wound* be inflicted.—This laſt is the better opinion, as ſhall be preſently made appear.

It is not incurred by *drowning* any perſon.

If a perſon immerſe another, whether an infant or an adult, into a water whence it is impoſſible for him to eſcape by ſwimming, (as the *ſea*, for inſtance,) retaliation is not incurred, according to *Haneefa*.—The two diſciples, on the contrary, maintain that retaliation is incurred; and ſuch alſo is the opinion of *Shafeï*; with this difference, however, that according to the two diſciples it is inflicted with a weapon, whereas according to *Shafeï* the murderer is to be drowned.—The arguments of thoſe doctors, in ſupport of their opinion upon this point, are twofold.—First, a ſaying of the Prophet, "*If any perſon drown another, I ſhall drown him in return.*" Secondly, *water* is an inſtrument of murder, the ſame as *fire*, wherefore the uſe of it is an argument of *wilfulneſs* in the act; and as there is no doubt with reſpect to the protection of blood of the ſlain, retaliation is conſequently incurred by him.—The arguments of *Haneefa* are alſo twofold.—First, water is analogous to a ſmall ſtick or rod, as it is ſeldom or never uſed in murder. Now it is ſaid, in the traditions, that death produced by a *rod* is merely *manſlaughter*; and as, in that, a fine merely is incurred, ſo here likewiſe. Secondly, retaliation requires the obſervance of a perfect equality: but between *drowning* and *wounding* there is no equality, the former being ſhort of the latter with regard to damaging the body.—As, therefore, the infliction of retaliation is in this cauſe impoſſible, a fine is conſequently due from the *Akilas* of the ſlayer.—With reſpect, moreover, to the ſaying of the prophet, adduced by the two diſciples, the drowning there treated of is to be regarded merely in the light of a *puniſhment*, and not as *retaliation*; for if the prophet had meant retaliation, he would have referred the execution of it to the relations of the drowned perſon, and not to [himſelf] the magiſtrate.

It is incurred [illegible] dier *wound-* erson, who dies in conſequence.

If a perſon wound another, ſo as to diſable and render him perpetually bedridden until death, retaliation is incurred by the perſon who inflicted the wound; for as a cauſe of murder here exiſts, and nothing occurs to do it away, the death muſt be referred to ſuch cauſe, and retaliation is incurred in conſequence.

It is not incurred by [illegible] n

If an army of *Muſſulmans* engage an army of infidels, and they mingle together, and a *Muſſulman* kill another *Muſſulman*, on the ſuppoſition of his being an infidel, he is not liable to retaliation, but muſt perform an expiation, and pay a fine; becauſe this is *homicide by miſadventure*; in which expiation and fine are due, but not retaliation,—as has been already explained.

produced by a combination of various cauſes.

a perſon hit himſelf upon the *head*, and *another* perſon alſo hit him upon the ſame part, and a wild beaſt tear him, and a ſnake bite him, and he die in conſequence of all theſe, the perſon who ſtruck him is liable for one third of the fine of blood; becauſe the acts of the wild beaſt and ſnake are of the ſame nature, and incur no penalty either in this world or the next; and as the act committed by the deceaſed upon himſelf is alſo of no account in this world, (notwithſtanding it be of account in the world to come, as the perſon in queſtion is therein univerſally admitted to be an offender,) this conſtitutes another ſpecies; and as, again, the act of the other perſon is of account both in this world and in the world to come, it therefore conſtitutes a *third* ſpecies.—Now, the deceaſed having periſhed in conſequence of theſe three different ſpecies of acts, he may be ſaid to have periſhed by *three ſeveral acts*; and as the act of the other perſon was one of theſe three, he is conſequently reſponſible for one third of the fine.

SECTION.

# SECTION.

A man may kill another in *ſelf-defence*

It is written in the *Jama Sagheer*, that if a perſon ſtrike at another with a ſword, during either night or day, or lift a club againſt another in the night in a city, or in the day-time in the highway out of the city; and the perſon ſo threatened kill him who thus ſtrikes with the ſword, or lifts the club, nothing is incurred; becauſe, as ſtriking with a ſword affords no room for delay or deliberation, it is in this caſe neceſſary to kill the perſon in order to repel him; and although, in the caſe of a *club*, there be more room for deliberation, yet in the night-time aſſiſtance cannot be obtained, and hence the perſon threatened is in a manner *forced*, in repelling the other's attack, to kill him; (and ſo likewiſe where the attack is made during the day-time in the highway, as there aſſiſtance cannot readily be obtained.) Where, therefore, a perſon thus ſlays another, the blood of the ſlain is of no account.

A fine is due

natic in ſelf-defence.

If a lunatic draw a ſword upon a perſon, and the perſon ſlay him, a fine of blood is due from his property, and does not fall upon his *Akilas*. *Shafeï* maintains that nothing whatever is incurred in this inſtance.—In the ſame manner alſo, if an *infant* draw a ſword and make an attack upon a perſon,—or if an *animal* attack any one, and the perſon ſo attacked ſlay the infant, or the animal, a *fine* is due on account of the infant, or the *value* on account of the animal, according to *Haneefa*, but not according to *Shafeï*. The arguments of *Shafeï* upon this point are twofold. First, as the perſon attacked ſlew the infant or lunatic in *ſelf-defence*, they are therefore accounted the ſame as a ſane perſon or an adult. Secondly, the perſon attacked ſlew the infant or lunatic becauſe of their act furniſhing him with a reaſon for ſo doing. He is therefore in the ſame predicament with a perſon acting under compulſion:—in other words, if a perſon threaten another, by ſaying to him, "kill me, or I will kill you," and the perſon thus threatened perceive that if he do not kill the other he will himſelf be ſlain, and accordingly kill him [the compeller,] nothing whatever is incurred;—and ſo here likewiſe. The argument of *Haneefa* is, that the ſlayer has in this inſtance killed a perſon of perpetually protected blood, or has deſtroyed a property [the animal] protected in right of the proprietor. Now the act of an animal is not of a nature to do away its protection; neither can an infant, by any act, forfeit the protection of his blood, notwithſtanding it be purely on behalf of his own right, infants not being capable of diſtinguiſhing between right and wrong;—(whence it is that an infant guilty of wilful murder is not liable to be put to death;)—in oppoſition to an adult, or one of ſound underſtanding, as thoſe are capable of ſo diſtinguiſhing. Still, however, retaliation is not incurred by the ſlaying of the infant or lunatic; becauſe, in the caſe in queſtion, a reaſon exiſts for their blood being out of protection,—namely, the repulſion of evil. A perſon attacked by them, therefore, is allowed to ſlay them, under a condition of reſponſibility, in the ſame manner as a perſon who eats the proviſions of another in a time of famine is reſponſible for the value ;—and the fine of blood is accordingly due.

IF a perſon draw a ſword upon another, and ſtrike him, and then go away, and the perſon ſtruck, or any other, afterwards kill this perſon, he is liable to retaliation. This is where the ſtriker retires in ſuch a way as indicates that he will not ſtrike again; for as, upon his ſo retiring, he no longer continues an aſſailant, and the protection of his blood (which had been forfeited by the aſſault) reverts, retaliation is conſequently incurred by killing him.

Retaliation is incurred by killing a perſon goin ter h made an attack upon another.

IF a perſon come in the night to a ſtranger, and carry off his goods by theft, and the owner of the goods follow and ſlay him, nothing whatever is incurred, the prophet having ſaid, "*Ye may kill in preſervation of your property.*" It is to be obſerved, however, that this is only where the owner cannot recover his property but by killing the thief; for if he knew that upon his calling out the thief would relinquiſh the goods, and he notwithſtanding neglect calling out, and ſlay him, retaliation is incurred upon him, ſince he in this caſe ſlays the perſon unrighteouſly.

A thief may be ſlain, *whi* *act o* without nalty.

CHAP.

## CHAP. III.

## Of Retaliation in Matters ſhort of Life.

Retaliation is inflicted for a hand

If a perſon wilfully ſtrike off the hand of another at the wriſt, his hand is to be ſtruck off in return, notwithſtanding it be larger than the hand of the other; becauſe the word of GOD (in the KORAN) "ſays, "THERE IS RETALIATION IN CASE OF WOUNDS;"—and alſo, becauſe, as the point upon which retaliation turns is *a perfect equality*, it is therefore to be inflicted in every caſe where an attention to ſuch equality is poſſible; and as this is poſſible in the caſe of ſtriking off the hand at the wriſt, it is therefore incurred in that inſtance. No regard, moreover, is paid to the ſize of the hand; becauſe there is no difference in the uſe or advantage of a hand according as it may be large or ſmall.

or foot (ſtruck off at the joint,) an ear, a noſe,

If a perſon ſtrike off the foot of another at the ankle, or cut off the *noſe* or *ear* of another, retaliation is to be inflicted upon him in return, ſince in ſuch caſes it is poſſible to attend to equality, as thoſe are all diſtinct members.

or an eye (if

If a perſon ſtrike another on the eye, ſo as to force the member, with its veſſels, out of the ſocket, there is no retaliation in this caſe, it being impoſſible to preſerve a perfect equality in extracting an eye. If, on the contrary, the eye remain in its place, but the faculty of ſeeing be deſtroyed, retaliation is to be inflicted, as in this caſe equality may be attended to by extinguiſhing the ſight of the offender's correſponding eye with a hot iron.

and alſo for the *teeth:*

If a perſon ſtrike out the *teeth* of another, he [the ſtriker] incurs retaliation, although his teeth ſhould be larger; becauſe the *ſize* of the teeth occaſions no difference of advantage in the uſe of them; and the neceſſity of retaliation, in ſuch a caſe, is moreover ſupported by a text of the KORAN, where GOD has ſaid, "EXACT A TOOTH FOR A TOOTH."

but not for *fractures.*

RETALIATION is not to be inflicted in the caſe of breaking any bones except the teeth; becauſe it is impoſſible to obſerve an *equality* in other fractures, ſince, if retaliation were exacted in ſuch caſes, it is to be apprehended that it might be inflicted to a degree greater or leſs than the offence.—It is otherwiſe in the caſe of *teeth*; for if thoſe be *broken*, retaliation may be inflicted by *filing*, or if they be *ſtruck out*, by extracting with an inſtrument.

Offences ſhort of life are either or *by miſadventure;*

OFFENCES which do not affect life are of two deſcriptions; *Amd*, or *wilful*; and *Khota*, or *by miſadventure*;—and the SEMBLANCE *of wilful* (which, in offences affecting life, we term *manſlaughter*) does not here find any place; becauſe the inſtrument uſed in taking life is the criterion by which the offence is determined to amount to *manſlaughter*, death being different according to the inſtrument uſed in producing it; but a deſtruction of any thing ſhort of life (that is, of member) is not different with relation to the difference in the inſtrument, as has been already obſerved.

and do not induce retaliation between a *man* and a *woman* a *free* perſon and a or *one*

THERE is no retaliation, in offences ſhort of life, between a man and a woman, a free perſon and a ſlave, or one ſlave and another ſlave. *Shafeï* maintains that retaliation holds in all theſe caſes,—except where a freeman ſtrikes off the limb of a ſlave, in which inſtance the limb of the freeman is not ſtruck off;—for as (according to him) retaliation for parts of the body is a dependant of retaliation for the *perſon*, (the parts of the body being dependants of the whole man,) it follows that where (agreeably to his tenets) retaliation holds for the *perſon*, it alſo holds for the parts of the body, and *vice verſa.* The argument of our doctors is, that the *parts* of the body are a ſpecies of property: now, in all matters of *property*, equality is deſtroyed by any difference in the value; and this difference is perfectly evident in the preſent caſe, as the LAW eſtimates the value of the ſame members, in different perſons, at a different rate, ſtating the fine for ſtriking off the hand of a *woman* (for inſtance) at only one half the fine for the ſame offence committed upon a man; (and in the ſame manner there is a difference in the value of ſlaves.) As, therefore, the obſervance of that equality, indiſpenſable in retaliation, is here impracticable, it follows that it cannot be inflicted. It is to be obſerved, however, that the inequality now mentioned, (between a man and a woman, &c.) is no objection to retaliation for the perſon, with reſpect to them, becauſe the *perſon*, where it involves the *life*, is not held in the ſame light with *property*.

but they do ſo between a *Muſſulman* and an *infidel.*

RETALIATION for parts of the body holds between a *Muſſulman* and an *infidel*, both being upon an equality with reſpect to *fines* for the offences in queſtion.

Retaliation is not inflicted

nor for a *ſtab.*

IF a perſon ſtrike off the hand of another above the wriſt-joint,—or give him a *ſtab* in any part, which afterwards heals, there is no retaliation; becauſe here it is impoſſible to obſerve equality, ſince in the former caſe bones are broken, and in the latter it is likely that if retaliation were inflicted the offender might die, a ſtab being frequently incurable.

If the corresponding member of

IF a perſon paralytic *, or having withered hands, ſtrike off the hand of a *ſound* perſon, he who is thus diſmembered has it at his option the maimer be defective, ſtill nothing

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* Arab. *Shill*, meaning a perſon afflicted with a palſy *in the hands.*

option either to cut off the defective hand (and nothing more,) or to take the complete fine for his own hand; for as, in this inſtance, he cannot poſſibly obtain his *preciſe* right, he muſt therefore be neceſſarily content to take ſomething leſs, or to accept of a ſubſtitute, namely, the fine;—in the ſame manner as where a perſon deſtroys the property of another, of the claſs of ſimilars, but the ſpecies of which is no longer to be found, except what is decayed*,—in which caſe the proprietor of the deſtroyed article has it in his option either to take the *decayed* ſimilar, or the value of what he has loſt. Thus, in the caſe in queſtion, the diſmembered perſon may either take the defective hand of the offender, or a fine for his own hand;—and as, upon his ſtriking off the defective hand, it is evident that he is content therewith, his right to any thing elſe then fails, in the ſame manner as where a decayed ſimilar is accepted in lieu of an *un*decayed ſimilar. If, in this caſe, the hand of the offender mortify and drop off, or be unlawfully ſtruck off, before the perſon whom he had diſmembered has made his choice of fine or diſmemberment as above, he is not then entitled to any thing, according to our doctors;—becauſe his appointed right was retaliation, which cannot now be obtained, from the circumſtance of its ſubject no longer exiſting; and as the *property* [fine] could not be due, or obligatory, but from being choſen in preference before the cutting or dropping off of the hand, and the choice has not been made, his right conſequently fails, and entirely drops. It is otherwiſe where a perſon, having defective hands, ſtrikes off the hand of another, and then has his own defective hand ſtruck off for theft, or in retaliation; for in this caſe he muſt pay the fine for a perfect hand, ſince here, as his hand has been loſt in ſatisfaction of a *right*, it ſtill (as it were) remains, and he oppoſes the retaliation.

and if ſuch member be (in the time) l nothing whatever is due.

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* As in the caſe of a perſon deſtroying any kind of *fruit* towards the cloſe of the ſeaſon.

There is no retaliation for the *tongue*, or the *penis*;

There is no retaliation for the tongue, or the virile member. It is recorded, from *Aboo Yooſaf*, that if either have been cut from the root, retaliation is due, as an obſervance of equality is then practicable. The argument of our doctors is that, as the yard of a man is ſometimes in a *flaccid* and ſometimes in a *turgid* ſtate, it is impoſſible to pay a ſtrict regard to equality in cutting it off;—except where the *nut* only is to be ſeparated at the *glans*, in which caſe the ſpot for cutting is preciſely aſcertained.

or for any privation, the extent of which cannot be preciſely

If a *part* of the nut of a man's yard be ſtruck off, there is no retaliation, as it is impoſſible to take off that preciſe quantity.—It is otherwiſe with reſpect to the *ear*;—for where either the *whole* ear, or a part, is ſtruck off, retaliation is incurred, as the ear is not occaſionally flaccid and turgid, but of certain aſcertainable dimenſions,—whence it is poſſible to obſerve equality in this inſtance.

If a man cut off the whole of another's lip, retaliation is inflicted upon him, becauſe here an obſervance of equality is practicable. It is otherwiſe where a *part* only of the lip is cut off, as in that inſtance equality cannot well be obſerved.

## SECTION.

ion may be commuted for a ſum of money,

WHEN the heirs of a murdered perſon enter into a compoſition with the murderer for a certain ſum, retaliation is remitted, and the ſum agreed for is due, to whatever amount; becauſe GOD has ſaid, in the KORAN, "WHERE THE HEIR OF THE MURDERED PERSON "IS OFFERED ANY THING, BY WAY OF COMPOSITION, OUT OF "THE PROPERTY OF THE MURDERER, LET HIM TAKE IT;"—and alſo becauſe the prophet has ſaid, "*The heir of the murdered per-* "*ſon is at liberty either to take retaliation, or a fine with the murderer's* "*conſent.*" As, moreover, retaliation is a right of the heirs, which they are at liberty to remit entirely by a free pardon, it follows that they may alſo remit it for a return, ſince their ſo doing is advantageous to them, and life to the murderer. It is therefore lawful, with the conſent of the avenger of blood and the murderer;—and it is the ſame whether the ſum be great or ſmall; for as the LAW does not ſpecify any particular amount, it is conſequently left to the parties, in the ſame manner as the conſiderations for *Khoola* or *Kitábat.*

payable on the ſpot, if term of cred be not ſtipulated

IF the murderer enter into a compoſition with the heirs of the perſon murdered, without any mention being made of a prompt or diſtant payment, the ſum agreed upon muſt be paid down; becauſe this ſum is made obligatory by a contract; and the original rule, in ſuch contracts, is a *prompt*, not a *diſtant* payment;—in the ſame manner as holds in the caſes of *dower*, and the *price* of property. It is otherwiſe with reſpect to the *Deyit*, or fine of blood, that not being impoſed by a *contract*, but particularly appointed, and its rate ſtated, an inſtitute of the LAW.

In a compoſition for murder, where a *ſlave* is concerned, his proportion is the ſame as that of a *man*.

If a freeman and a ſlave together murder any perſon, and the freeman and the ſlave's maſter afterwards deſire ſome man to compound the matter [with the deceaſed's heirs,] on behalf of both the murderers, for one thouſand *dirms*, and he compound it accordingly, the whole is due from them (the maſter and the other) in equal proportions; becauſe they are co-parties in the contract of compoſition; and the thouſand in queſtion is due as a ſubſtitute for retaliation; and as both are equally liable to retaliation, the ſubſtitute for it muſt therefore be paid by them in equal ſhares.

One of ſeveral heirs compounding a murder, defeats the right of the reſt to retaliation,—and they get their ſhares of the fine of blood,

If one of the heirs of a murdered perſon pardon the offence, or enter into a compoſition with the murderer for a ſum of money oppoſed to his ſhare of retaliation, the right of all the heirs to retaliation ceaſes, and they get, in either caſe, their reſpective proportions of the fine of blood.—It is here to be obſerved, as a rule, that as retaliation is the right of *all* the heirs, ſo likewiſe is the fine of blood. According to *Shafeï* and *Málik* the fine of blood is the right of all the heirs except a huſband or wife; becauſe an heir is the ſucceſſor (or, in other words, the ſubſtitute) of the deceaſed in virtue of *affinity*, and not of any ſecondary cauſe, ſuch as marriage, which at death ceaſes to exiſt.

Objection.—It would hence appear that a huſband and wife do not inherit of each other with reſpect to *other* property likewiſe, ſince the *cauſe* is terminated by the deceaſe of either.

Reply.—According to *Málik* and *Shafeï*, the fine of blood is not due until *after* death: contrary to all other property, the right of the heirs being connected with the eſtate of the deceaſed in the commencement of his ſickneſs, (whence it is that the acts of a ſick perſon do not hold good with reſpect to any thing beyond a *third* of his property,) and confirmed by his demiſe; and accordingly, his eſtate goes among the *whole* of his heirs, without any exception. It is otherwiſe with a *fine of blood*; for as that is not due until after death, and the cauſe * is terminated by the deceaſe of the party, it follows that it cannot be inherited by the *wife* or *huſband*. —The arguments of our doctors upon this point are twofold.—FIRST, the prophet decreed to the wife of *Aſheem Zeeàbee* an inheritance in the fine impoſed for the blood of her huſband.—SECONDLY, the fine is a right to which inheritance appertains, inſomuch that if a perſon be ſlain, having two ſons, and one of thoſe ſons afterwards die, leaving a ſon, his heir, the fine is ſhared between the ſon and the ſon's ſon. It is therefore eſtabliſhed on behalf of *all* the heirs indiſcriminately; and the effect of marriage continues with reſpect to inheritance, after the demiſe of either of the parties. It is here proper to remark, that where one of the heirs grants a pardon, as above, the ſhares due to the others are payable within three years. *Ziffer* maintains that payment muſt be made within *two* years, in a caſe where the right of retaliation lies between two perſons, and one of them grants a pardon; for here an *half* fine is due, whence this is the ſame as where a perſon ſtrikes off the hand of another by miſtake, in which caſe an half fine is due, payable within two years. The argument of our doctors is that the half here due is a proportion of the fine of blood; and as the whole of a fine of blood is payable in three years, ſo likewiſe is any part of it. The proportion due on account of a *hand*, on the contrary, is the *whole* of the recompence for a *hand*, which is payable in two years; and therefore the analogy urged by *Ziffer* in this particular is not admitted.—It is likewiſe proper to obſerve that the proportions owing to the remaining heirs, (as here mentioned,) is due from the property of the murderer, the act being in this caſe *wilful*.

payable within three years:

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* Meaning, the ground of inheritance between huſband and wife.

perſon does not prevent re- a *ſe-* murder.

**If a man murder two perſons, and the heirs of one of the murdered perſons grant a pardon, ſtill the right of retaliation remains on behalf of the heirs of the *other* murdered perſon; becauſe in this caſe there are *two* retaliations, each murder being a diſtinct and ſeparate act.—It is otherwiſe in the preceding example, for there *one* tion only is incurred, one murder only having been committed.**

All the perſons der are alike liable to retaliation.

If a number of perſons unite in murdering a man, analogy ſuggeſt that *one* of them only is to be put to death in retaliation, as equality is indiſpenſable in the infliction of retaliation, and between *ten* perſons (for inſtance) and *one* perſon there is no equality.—The whole are, however, liable to ſuffer death, analogy being in this inſtance abandoned for a more liberal conſtruction of the law;—becauſe it is related that when, on a certain occaſion, ſeven of the inhabitants of *Lena** murdered a man, *Omar* decreed retaliation upon all the ſeven, ſaying, "If the *whole people* of *Lena* had aſſiſted in the "murder, I ſhould certainly have ſlain them *all*;"—and alſo, becauſe murder is ſtill more likely to be committed by *ſeveral* than by *one*; and retaliation has been ordained for the purpoſe of determent, and a warning to the vicious.—Each individual concerned is therefore as if he alone had committed the act; and conſequently equality is certified, and retaliation incurred, in order that the lives of mankind may be in ſecurity.

Caſe of a perſon guilty of *ſeveral* murders.

If one man murder ſeveral perſons, and the heirs of all the murdered perſons appear together, the murderer is put to death on behalf of the whole, nor are the heirs entitled to any thing further.—If, alſo, *one* of the heirs only appear, the murderer is ſlain on behalf of him, and the right of the others is conſequently annulled.—*Shafei* maintains that the murderer is put to death on behalf of the heir of the perſon firſt murdered, and a fine of blood is due to the others; and that, if all the heirs appear together, and it be not known which of the perſons was firſt murdered, the murderer is ſlain on behalf of the whole, and a fine of blood divided among all.—The reaſon he alledges is that, in the example here ſuppoſed, ſeveral murders are committed by one man; but one murder only is proved againſt him*; and as between *one* murder and *ſeveral* murders there is no equality, he is therefore put to death on behalf of one perſon only, and a fine is due to the others.—The arguments of our doctors upon this point are threefold. FIRST, Each of the heirs of the ſeveral perſons murdered is here ſuppoſed, in fact, to execute retaliation upon the murderer completely and individually; as in the preceding example of ſeveral perſons murdering one,—where each of the ſeveral murderers is as if he had alone committed the murder, otherwiſe retaliation could not be inflicted becauſe of inequality; and ſo likewiſe, in the caſe in queſtion, as each of the heirs is as if he himſelf executed the retaliation, equality is in this way eſtabliſhed. SECONDLY, There proceeds, from each heir, in this inſtance, a wound, ſufficient to diſpatch the ſoul [of the murderer]; and conſequently the death [of the murderer] is referred to each of them individually:—for it is a rule that whenever an effect ſprings from a variety of cauſes, it muſt neceſſarily be referred to thoſe cauſes collectively; and it then muſt follow, either that a *part* or the *whole* of the effect is referred to each particular cauſe; and as the former is here impoſſible (ſince the diſpatching of the ſoul from the body is a thing incapable of diviſion, ſo as to have any part of it in particular referred to any particular cauſe) it is therefore determined that the whole effect is referred to each cauſe individually.—THIRDLY, retaliation has been inſtituted with a view to the ſecurity of mankind, under a precept which militates againſt it, the prophet having ſaid, " *Man is the choſen veſſel of* GOD ;—*ac-* " *curſed is he who deſtroyeth the ſame* ;—and as this ſecurity is obtained by putting the murderer to death, retaliation alone is therefore ſufficient, and conſequently no fine is required.

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* Becauſe *one* murder alone being ſufficient to convict the criminal, none of the others are adduced in judgment againſt him.

Retaliation is done away by the death of the murderer.

WHEN a perſon who had incurred retaliation dies, the right to retaliation neceſſarily ceaſes*, as the ſubject of it no longer remains.

Two men uniting to maim a third

IF two men cut off the hand of one man, by both ſeizing a knife and applying it to the joint, until the hand be ſeparated, retaliation is not to be inflicted on either of them, but they are reſponſible for one half of the fine of blood; becauſe the mulct for a hand is half the fine for the perſon; and as they united in depriving the man of his hand, the half of the fine of blood therefore falls upon each.—*Shafeï* maintains that the offenders are each to be deprived of a hand; becauſe the hand is a dependant of the perſon; and as, if two men kill one, retaliation is executed upon both, ſo in the ſame manner, in the caſe of a hand, as it is a dependant of the perſon, retaliation is executed upon both the offenders.—Beſides, retaliation, whether for the perſon, or for parts of the body, has been ordained for the purpoſe of determent.—Hence, whatever is eſtabliſhed with reſpect to the *perſon* for the purpoſe of determent, is likewiſe eſtabliſhed with reſpect to the parts of the body for the ſame purpoſe; and as, in caſes concerning the perſon [life,] retaliation is inflicted upon both the murderers where two men murder a third, ſo likewiſe, in a caſe of diſmemberment, retaliation is inflicted upon both.—The arguments of our doctors upon this point are twofold. FIRST, each of the offenders, reſpectively, has cut off a part of the hand, inaſmuch as the amputation has been effected by both, and the ſubject is capable of partition.—A part of the amputation is therefore referred to one of the offenders, and a part to the other; and as there is no equality between the amputation of a *part* of the hand, and the amputation of the *whole*, there cannot, conſequently, be any retaliation. It is otherwiſe in caſes affecting the perſon [life,] as the act of diſpatching the ſoul from the body is incapable of partition. SECONDLY, in a murder committed by ſeveral perſons, (that is, where a number unite in murdering one,) it is moſt probable that no one will come to the aſſiſtance of the murdered; whereas, in the caſe of two perſons uniting to cut off the hand of a third, as there is neceſſarily a conſiderable delay in the execution, it is moſt probable that the perſon they deſign to injure may obtain aſſiſtance before they effect their purpoſe.—Hence between the caſe in queſtion and a caſe affecting the perſon there is no analogy.

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* Conſequently, no fine is due, either from the murderer's eſtate, or from his *Akilas*.

A perſon

retaliation and fine;-

IF a man ſtrike off the right hands of two others, or the *left* hands of two, and both appear againſt him, the right hand of the offender is cut off in the former inſtance, or his left hand in the latter,—and a moiety of the fine of blood is moreover exacted from him, and divided equally between the parties;—and this whether the hands were ſtruck off, both at the ſame time, or one after the other.—*Shafei* maintains that in the latter inſtance, the hand of the offender is ſtruck off ſolely on behalf of him who was firſt deprived of his hand; and that where both hands were ſtruck off together, the parties draw lots, and the retaliation is then executed on behalf of him to whoſe lot it falls.—The argument of our doctors is that, as the diſmembered parties are upon an equality with reſpect to the ground of their claim, (each having loſt a hand,) they are therefore upon an equal footing with reſpect to the *effect* alſo, namely, the retaliation,—in the ſame manner as two creditors are upon an equal footing in their claims upon the eſtate of a deceaſed perſon, notwithſtanding the debt owing to one be of prior date to that owing to the other*.

and, if only *one* of the two appear, retaliation is executed on his behalf, the other the fine.

If a man ſtrike off the right hands of two others, or the *left* hands of two, and only *one* of the parties appear, retaliation is executed on behalf of this one, and a moiety of the fine of blood is due to the other; becauſe the party preſent is entitled to take his right; and the right of the abſent party is dubious, ſince it is poſſible that, if preſent, he might either pardon the offence or decline proſecuting; and it is not allowable to make any delay in rendering a *certain* right on account of one which is merely *conjectural*;—and as, upon the party preſent taking the retaliation, the ſubject on which the other party might execute it no longer remains, the fine is the appointed right of the other, ſince here the offender has loſt his hand on account of a right which lay againſt him, and may therefore be ſaid to have *obſtructed* the right of this one.

A ſlave may be put to death on con- [illegible]g a murder.

If a ſlave confeſs a murder, he incurs retaliation. *Ziffer* maintains that the acknowledgment of a ſlave is not valid in this inſtance; for as he, by ſuch acknowledgment, ſets at nought the right of his maſter, it therefore cannot be admitted, any more than the acknowledgment of a ſlave concerning property †.—The arguments of our doctors upon this point are twofold. First, a ſlave, in confeſſing a murder, is not liable to any ſuſpicion, ſince ſuch confeſſion is eſſentially prejudicial to himſelf, as being productive of his death.—Secondly, a ſlave, with reſpect to his *blood*, continues in his original ſtate of liberty, freedom being the original ſtate of MAN,—whence it is that the acknowledgment of a maſter, inducing puniſhment or retaliation upon his ſlave, is not admitted.—With reſpect to the argument of *Ziffer*, we obſerve that the acknowledgment of murder, by a ſlave, is prejudicial to himſelf *poſitively*; but it is ſo to his maſter only by *implication*, which is of no weight.

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* The tranſlator apprehends that little apology is neceſſary for his here omitting the arguments advanced by *Shafei* in ſupport of his doctrine, and the reaſonings adduced by the *Haneefite* doctors in reply to them, as they are much of the ſame complexion with thoſe which have been already recited.

† A ſlave's acknowledgment concerning property is not of any weight. See Vol. III. p. 138.

Caſe of murder a neou cide united

IF a man wilfully ſhoot an arrow at any perſon, and the arrow paſs through that perſon, and then hit another, and they both die, retaliation is incurred on behalf of the former perſon, and a fine of blood on behalf of the latter, to be paid by the *Akilas* of the murderer;—becauſe the *firſt* killing is *murder*; whereas the *ſecond* is only *homicide by miſadventure*,—in the ſame manner as where a perſon ſhoots at a deer, and his arrow hits a man.—An act, moreover, is eſtimated according to the number of its effects; and hence it is poſſible that the act of the murderer, in ſhooting the arrow, was wilful with reſpect to the one perſon, and inadvertent with reſpect to the other.

## SECTION.

Caſes of

IF a man ſtrike off the hand of another by miſtake, and then ſlay him wilfully before he has recovered from the wound,—or, ſtrike off his hand wilfully, and then ſlay him by miſtake before he has recovered,—or, ſtrike off his hand by miſtake, and after the wound is healed ſlay him by miſtake,—or, ſtrike off his hand wilfully, and after the wound is healed ſlay him wilfully,—he is proſecuted on both counts in all theſe caſes*.—The ground of this is that both the wounds muſt be conſidered under one head, if it be poſſible that the *ſecond* wound was merely a completion of the *firſt*, as ſlaying is moſt frequently effected by ſeveral ſucceſſive wounds; for if each wound were conſidered ſeparately, one being regarded as mortal, and the other not, it would create a difficulty in the determination.—The ſecond wound is therefore to be regarded merely as a completion of the firſt, and both included under one ſentence,—except where this conjunction is impoſſible, when each wound muſt be conſidered under a ſeparate head.—Now, in the four caſes here ſtated, this conjunction cannot be made; for, in the two *firſt* caſes, the two acts are ſubject to two different ſentences,—and in the two *others*, the ſecond wound is not inflicted until after the party has recovered from the *firſt*, a circumſtance which prevents the one from having any connexion with the other.—If the ſecond wound be inflicted before the firſt is healed, and the acts be both of the ſame ſpecies, both being by *miſtake*, they are reſolved under one head, undiſputedly, ſince a conjunction is in this inſtance poſſible;—and therefore one fine ſuffices.—If, on the contrary, the offender firſt ſtrike off the hand wilfully, and then, before the wound is healed, kill the perſon wilfully, the magiſtrate may deſire the heirs either firſt to ſtrike off the offender's hand, and then to put him to death,—or to put him to death at once, without ſtriking off his hand;—in other words, the heirs have either of theſe modes in their choice, and the magiſtrate alſo is at liberty to determine either way.—This is according to *Haneefa.*—The two diſciples maintain that the offender, in this inſtance, can only be put to death, and is not to have his hand ſtruck off beſides; for here it is poſſible to reſolve both the wounds under one head, both the acts being of one ſpecies, namely *wilful.* The argument of *Haneefa* is that in this caſe a conjunction of both wounds under one head is impoſſible; becauſe the two acts are eſſentially different, one being merely the diſmemberment of a part of the body, whereas the other is a deprival of life.—Both, moreover, as being *wilful*, are ſubject to the ſame rule, namely, retaliation; and retaliation requires an equality with reſpect to the act, which, in the caſe in queſtion, cannot be obſerved but by taking life for life, and a hand for a hand: but if both wounds be reſolved under one head it is impoſſible to preſerve equality, becauſe in that caſe the offender is only ſlain, without any retribution for the diſmemberment.—Beſides, the murder prevents any reference of the conſequence to the diſmemberment, inſomuch that if the two acts were to proceed from two different perſons, retaliation would be due upon the murderer.—Theſe two offences are therefore ſubject to the ſame rule as the two between which a recovery intervenes *.

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* In the *firſt* of theſe caſes, therefore, the offender's property is ſubject to a fine for the hand, and he alſo ſuffers retaliation for the murder; in the *ſecond*, he is ſubject to retaliation for the hand, and alſo to a fine for the homicide; in the *third*, he is ſubject to a fine for the hand, and alſo to a fine for the homicide; and in the *fourth* he ſuffers retaliation, firſt for the *hand*, and then for the *murder*.

perſon dying
quence of
*ſtripes* unjuſt-
ly inflicted;

If a perſon give another one hundred ſtripes [with a ſtick or rod,] and the perſon ſo ſtruck recover from *ninety* of the ſtripes, ſo as that no mark of them remains, and then die in conſequence of the ten laſt ſtripes, one fine of blood is due;—becauſe, upon his recovering from ninety of the ſtripes, they are no longer of any conſideration with reſpect to the *fine*, notwithſtanding they ſtill be ſo with reſpect to correction; and hence, with reſpect to the fine, no more than ten ſtripes remain to be conſidered.—The ſame rule obtains with reſpect to every wound which heals and leaves no mark, according to *Haneefa.*—*Aboo Yooſaf* alledges that in ſuch caſes a fine is due in proportion to the pain or trouble ſuſtained;—in other words, an eſtimate muſt be made of what is the adequate recompence for ſo much trouble, and the reſult gives the fine to be impoſed.—*Mohammed*, on the other hand, ſays that nothing is due in ſuch a caſe except the expences of the phyſician or ſurgeon.

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* A long train of futile reaſoning is here omitted, as being of no conſequence whatever to the ſubject, nor tending to throw any new light upon it.

or being *cut*

If a perſon give another one hundred ſtripes, and thereby cut him, and the cuts heal, but leave ſcars, an *Hakoomit Adil*, or award of equity, is due on account of ſuch ſcars.—(An explanation of *Hakoomit Adil* ſhall be given in its proper place *.)

Forgiveneſs [illegible] d not exempt from a fine, in caſe of his death, unleſs it extend to any *conſequence* of the maiming.

If a perſon ſtrike off the hand of another, and the perſon ſo diſmembered pardon the diſmemberment, and afterwards die in conſequence of it, a fine of blood is due,—from the offender's property, if the offence was wilful,—or from his *Akilas*, if it was by miſadventure.—If, on the other hand, he pardon not only the diſmemberment, but alſo any conſequence which may ariſe from it, and afterwards die of the wound, his pardon comprehends both *life* and *diſmemberment*;—and then, if the offence was committed by miſtake, the pardon is eſtimated as from one third of the deceaſed's property †; but if it was committed wilfully, the pardon is in that caſe eſtimated as from the *whole* of the property ‡. The reaſon of this is, that the decree in wilful murder is retaliation; and as retaliation is not property, the right of the heirs is not connected with it before the demiſe of the wounded perſon, wherefore the pardon and remiſſion are valid on his part, and are conſequently eſtimated as from the whole of his property. Manſlaughter, on the contrary, is ſubject to the law of property; and as the right of the heirs is connected with the dying perſon's property, the remiſſion, therefore, in ſuch caſe, is eſtimated as from the *third* of the property; becauſe it is a gift of the fine; and the gift of a dying perſon takes effect in one third; and as this is a bequeſt to the *Akilas* of the murderer, not to the murderer himſelf,

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* In the next following book, treating of *Fines*.

† That is to ſay, it has effect in remitting one third of the fine; but fails with to the other two thirds, which therefore ſtill remain due, notwithſtanding the pardon.

‡ In other words, it has effect in a complete remiſſion of the fine.

himſelf[*], it is conſequently valid.—This is according to *Haneefa*.—The two diſciples maintain that pardon for the diſmemberment extends alſo to life;—(and the ſame difference of opinion obtains where a perſon pardons another for giving him a cut, of which he afterwards dies.) Their argument is, that the pardon of the diſmemberment is alſo a pardon of its effect, which muſt be one of two things, namely, the *loſs of a hand* in caſe of a cure, or *the loſs of life* in caſe the wound prove fatal. A pardon of diſmemberment, therefore, is alſo a pardon of one of theſe effects, whichever it may happen to prove. Another argument is, that the term *diſmemberment* extends both to a *mortal* wound, and alſo to one *not* mortal; and therefore a pardon of *diſmemberment* is a pardon either way; this being the ſame as a pardon of an *offence*;—in other words, if the wounded perſon were to ſay, "I pardon this *offence*," a pardon is eſtabliſhed in both ways, the term *offence* comprehending *mortal* wounds and alſo wounds *not* mortal. The argument of *Haneefa* is, that here a cauſe of reſponſibility is eſtabliſhed in the death of a perſon whoſe blood was in a continual ſtate of value and protection; and to this the pardon does not expreſsly extend, becauſe it was granted with reſpect to the *diſmemberment*, which is different from the *death*; and in conſequence of the wound proving mortal it becomes evident that the act was in reality murder; and with that alſo the right of the murdered perſon is connected; and as no pardon was granted with reſpect to *that*, a decree of reſponſibility for it iſſues. Analogy would ſuggeſt that retaliation is incurred for it, as being a *wilful* murder: but on a more favourable conſtruction of the LAW a fine only is due, as in conſequence of forgiving the diſmemberment a demur is engendered, and retaliation is repelled by any demur. In reply, moreover, to the arguments of the two diſciples it is anſwered, that the conſequence [death] is murder from the beginning, and not merely one deſcription of effect produced by diſmemberment; and therefore a pardon of the *diſmemberment* is not a pardon of the *murder*. It is otherwiſe in the pardon of an *offence*, as the term *offence* comprehends both *murder* and *maiming*. It is alſo otherwiſe in the pardon *of a cut, and of every conſequence which may ariſe from it*, ſince in this caſe the pardon is expreſsly extended to death itſelf.

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[*] The reaſon of this diſtinction is, that any bequeſt by a murdered perſon on behalf of his murderer is null.—The pardon is here conſidered in the light of a *bequeſt*; for as the fine for his hand virtually belongs to the diſmembered perſon from the inſtant of the act, his remiſſion of it is, in effect, a *bequeſt* of it to the *Akilas* of the offender.

Caſe of a woman marry- a man in ence for maiming him.

If a woman ſtrike off the hand of a man, and marry him, as a recompence, and he afterwards die of the wound, the woman is entitled to her proper dower, and a fine of blood is due—from the *Akilas* if her offence was involuntary, and from herſelf if it was wilful; becauſe, according to *Haneefa*, a forgiveneſs of the diſmemberment is not a forgiveneſs of the conſequence, and therefore her marrying him in recompence for the diſmemberment merely implies a pardon of the diſmemberment itſelf, but not of any effect which may reſult from it. Hence ſhe is ſtill liable to the fine of blood in caſe the man die. It is here to be obſerved that if the diſmemberment have been wilful, the marriage on account of ſuch diſmemberment is a marriage in lieu of retaliation; and as retaliation, not being property, is incapable of conſtituting a dower, the woman is ſtill entitled to her proper dower. A dower being therefore due *to* the woman, and a fine owing *from* her, there is a mutual liquidation in caſe both be of an equal amount; or if the fine be more than the dower, the woman is to pay the difference to her huſband's heirs; or if it be *leſs*, the heirs muſt pay her the difference. If, on the contrary, the diſmemberment have been *accidental*, the marriage is in lieu of a mulct for the hand; but as, upon the diſmemberment proving fatal, it is aſcertained that no fine is due for the hand, it follows that the ſpecific ſum which ſtood for the dower no longer exiſts, and conſequently that a proper dower is due;—in the ſame manner as where a woman marries a man "*for what is in his hand*,"—and it prove that he had *nothing* in his hand,—in which caſe a proper dower is due, and ſo here likewiſe. In this laſt inſtance, moreover, there is no mutual liquidation of the dower by the fine of blood [due in conſequence of the huſband's deceaſe;] becauſe, as the offence was not *wilful*, but by *miſadventure*, the fine falls not upon the *woman*, but upon her *Akilas*,—whereas the dower is the right of the woman herſelf; and there can be no mutual liquidation unleſs each party owe ſomething to the other.

IF, in the example above ſtated, the man marry the woman "as "a ſatisfaction for *the diſmemberment, and every conſequence which* "*may reſult from it*," or "as a ſatisfaction for *the offence*," and he afterwards die of the wound, the woman is entitled to her proper dower if the diſmemberment was *wilful*; becauſe, in this caſe, ſhe married in lieu of retaliation; and retaliation, not being *property*, is incapable of conſtituting a dower;—in the ſame manner as where a woman marries for *wine* or a *hog*;—in which caſe, thoſe articles not being property, ſhe is entitled to her proper dower;—and ſo here likewiſe. In this inſtance, moreover, the retaliation is completely remitted, and nothing remains due from the woman [in lieu of it;] for upon the man conſtituting retaliation the dower, he becomes content that it ſhould be remitted on behalf of the ſame. The original retaliation, therefore, ceaſes, in the ſame manner as where a perſon remits retaliation on the condition of its being converted into property; and no fine is due (in conſequence of the deceaſe of the wounded perſon,) becauſe the offence was *wilful**. If, on the contrary, the diſmemberment was *accidental*, the fine of blood is in that caſe conſidered as the woman's dower, and a proportion of it adequate to her proper dower is *remitted* from her *Akilas*, and the remainder is regarded as a *bequeſt* to them *; for here the marriage in recompence of the diſmemberment is a marriage in lieu of the *conſequent*, namely, the *fine*; and as the fine, being itſelf property, is capable of conſtituting a dower, it is the dower accordingly;—but this only in the proportion of the woman's *proper* dower. With reſpect to the remainder, it is conſidered as a bequeſt to the woman's *Akilas*, which they are competent to benefit by, as not having been themſelves concerned in the bloodſhed. If, therefore, the amount do not exceed one third of the deceaſed's property, the *whole* is remitted to them; or, if it exceed, they have to pay the difference to the heirs †.

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* In conſequence of the offence being *wilful*, the fine for it would be due from the woman herſelf, and not from her *Akilas*.

Retaliation for *maiming* does not exempt from retaliation for the *perſon*, in caſe of the death of the maimed.

If *Zeyd* wilfully ſtrike off the hand of *Khàlid*, and ſuffer retaliation, and *Khàlid* afterwards die in conſequence of the loſs of his hand, *Zeyd* is ſtill liable to be put to death in retaliation, as he then appears to have murdered *Khàlid*, who is conſequently entitled to retaliation for the *perſon*. The heirs of *Khàlid*, therefore, may put *Zeyd* to death, as the right of *Khàlid* to retaliation for the perſon is not done away by the diſmemberment of the offender;—in the ſame manner as where a man, being entitled to execute upon another retaliation for the perſon, takes a limb from that other;—in which caſe his right to retaliation for the *perſon* is not annihilated; nor is any thing due for the *limb*, as the *whole perſon* was forfeited, and the *limb* was only a part of it; and ſo likewiſe in the preſent inſtance. *Aboo Yooſaf* alleges that upon cutting off the offender's hand, the right to any further retaliation ceaſes, as the retaliation being executed in that manner, the offender is diſcharged from all further conſequences. To this, however, it may be replied that the hand of the offender was ſtruck off only under the idea of that being the ſole right; and that therefore the offender is not diſcharged from retaliation for the *blood-ſhed*, as the death of the wounded perſon had not then taken place.

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* The reaſon of this diſtinction is that, in *accidental* offences, the fine falls upon the *ilas*, not upon the *offender*; whereas, in the caſe of *wilful* offences, the fine being always conſidered as a compromiſe for retaliation, falls upon the offender alone, the *Akilas* having no concern in it.

† To underſtand the phraſeology which runs through this and the preceding example, it is neceſſary to recollect that a dower, like any other conſideration, may be underſtood either by an *actual payment* of ſomething to the woman, or by the remiſſion (on the part of the huſband) of ſomething owing from the woman.—When, therefore, we ſay, "the *fine* "conſtitutes the dower," or "*retaliation* conſtitutes the dower," nothing more is meant than that the woman marries the man in conſideration of thoſe being remitted to her.

An heir executing retaliation for murder, by *maiming*, without authority of the magiſtrate, is liable to a fine

IF the heir of a murdered perſon cut off the hand of the murderer, and remit any farther retaliation, either before or after the decree of the magiſtrate, authorizing the ſame, he [the heir] owes a fine for the hand, according to *Haneefa*. The two diſciples, on the contrary, maintain that nothing whatever is due; becauſe here the heir of the murdered perſon has taken what was his right, and conſequently is not required to make any atonement; for he is entitled to deſtroy the perſon of the murderer *in toto*; and as a *limb* is merely a dependant of the *perſon*, it follows that he is entitled to deſtroy any particular *limb*. He is therefore not required to make any atonement whatever,—whether the diſmembered murderer pardon him or otherwiſe,—or, the wound prove fatal or otherwiſe,—or, he firſt ſtrike off the hand and then take the life, either before or after the wound is healed;—this caſe being analogous to one where, retaliation for the hand being due, the perſon who is to exact it firſt ſtrikes off the *fingers* of the offender's hand, and then remits the retaliation upon the hand,—in which caſe he is not reſponſible for the fingers. The argument of our doctors is that in this inſtance the heir has taken what was not his right; for *killing* was his right, not *diſmemberment*. A fine is therefore due for the hand of the murderer thus unjuſtly ſtruck off. Analogy, indeed, would ſuggeſt that the murderer's heir is here entitled to exact *retaliation* for the hand:—that, however, is remitted becauſe of a doubt; for it was lawful for him to ſtrike off the murderer's hand as a dependant of his *perſon*. Retaliation, therefore, being thus remitted, the fine is due:—*after*, however the murderer recovering from the wound, and not *before*; for it is poſſible that the wound may prove mortal, in which caſe the murderer's heir is entitled to take his right *.

In retaliation for *maiming*, a fine is due, if it occaſion *death*.

If a perſon be entitled to retaliation upon another with reſpect to any part of the body, and ſtrike off that part accordingly, and the perſon upon whom retaliation is thus executed die in conſequence, the perſon in queſtion is liable for a fine of blood, according to *Haneefa*. The two diſciples allege that he is not in any reſpect reſponſible, ſince he has only taken what was his right, and it is impoſſible to reſtrict diſmemberment to the condition of *ſafety*,—(in other words, to require that it be executed ſo as not to endanger the perſon who ſuffers diſmemberment,) for if ſuch were the caſe, retaliation would be altogether prevented, it being impoſſible always to avoid its proving fatal. The perſon in queſtion, therefore, ſtands in the ſame predicament with an *Imâm*, a *cupper*, or a *phlebotomiſt*;—in other words, if an *Imâm* execute retaliation by cutting off a limb, or a cupper apply his cupping-horn, or a phlebotomiſt uſe his lancet, by deſire of a patient, and the wound ſo occaſioned prove fatal, ſtill no fine is due; and ſo here likewiſe. The argument of *Haneefa* is that the perſon in queſtion has ſlain another wrongfully; becauſe his right was to *diſmember*, not to *kill*, but here he has *killed*. Now, ſuch being the caſe, analogy would ſuggeſt that *retaliation* is incurred by him, as having wilfully and without right ſlain another. Retaliation, however, is remitted in this inſtance, becauſe of the doubt which here exiſts; for the perſon, in cutting off the limb, did not intend to deſtroy life, but merely to take his right. A fine, therefore, is due from him. It is otherwiſe with reſpect to the *Imâm*, the cupper, or the phlebotomiſt, for all theſe act upon authority,—the *Imâm*, in virtue of his office, which requires him to perform ſuch acts for the good government of the people,—and the cupper or phlebotomiſt, in virtue of orders from and agreement with the perſon upon whom they perform their operations. It is to be obſerved, moreover, that the performance of any thing ſtrictly incumbent is not reſtricted to the deſcription of *ſafety*,—ſuch, for inſtance, as the ſhooting of an arrow at an enemy:—but in the caſe in queſtion there is nothing ſtrictly *incumbent*;—nay, forgiveneſs is rather commendable, GOD having ſaid, "IF YE REMIT RETALIATION, IT IS A KINDNESS." The taking retaliation for the *hand*, therefore, is a matter of indifference, in the ſame manner as hunting game; and conſequently is reſtricted to the condition of ſafety.

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* The reply to the arguments of the two diſciples is omitted in the tranſlation, being, for the moſt part, merely a repetition of what had gone before.

## CHAP. IV.

## Of *Evidence* in Caſes of *Murder* [*].

Evidence to *murder* muſt be eſtabliſhed by each heir ſeparately, and independant of

IF a perſon be ſlain, and leave two ſons, one preſent [†], and another abſent, and he who is preſent eſtabliſh evidence to the fact, and the other afterwards appear, it is in this caſe requiſite that *he* alſo eſtabliſh evidence to the fact, according to *Haneefa*. The two diſciples, on the contrary, maintain that there is no occaſion for this. If, how-

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[*] The term is here to be underſtood in a general ſenſe, including every ſpecies of homicide.

[†] In the city, or the court of the

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* Arab. *Mûwris*, meaning the perſon from whom inheritance deſcends. (See note in Vol. II. p. 705.)

† Arab. *Zât*, meaning the *ſelf*,—the body as connected with the ſoul. (See note in p. 276.)

àct,

*act*, and it is impoſſible that any act ſhould proceed from the *dead.*—The deceaſed, therefore, has no property in the retaliation. It is otherwiſe with reſpect to debts, or the fine of blood, as theſe are property, and a defunct is capable of being a proprietor;—as where, for inſtance, a game-catcher lays his ſnares, and then dies, and game is found in the ſnares after his deceaſe,—in which caſe the game-catcher is conſidered as proprietor of the ſame. Retaliation, therefore, being eſtabliſhed by *ſubſtitution*, and not as an *inheritance*, no one of the heirs can be litigant for the others;—and as the others ſtand in need of again eſtabliſhing their evidence, the abſent heir will therefore be required, on making his appearance, to eſtabliſh evidence on his part.

Retaliation is remitted by the murderer adducing evidence to prove the remiſſion of it by an abſent heir.

If a murderer adduce evidence to prove, againſt the preſent heir, that the abſent heir has remitted the retaliation, in this caſe the preſent heir is litigant, and the evidence thus adduced by the murderer being credited, the right of retaliation ceaſes accordingly. The murderer, moreover, is not in this caſe under any neceſſity of producing his evidence again upon the abſent heir appearing; for his plea here is that "the right of the preſent heir to *retaliation* has been commuted "into a right to *property*,"—a plea which cannot be ſubſtantiated but by proving the remiſſion on the part of the abſentee. In fine, the plea of the defendant is here founded on the plea of the abſentee's remiſſion; and as, in all ſuch caſes, the party preſent is litigant for the abſentee, the preſent heir is therefore litigant for the abſent heir in this inſtance.

If a ſlave held in partnerſhip between two men be murdered, one of the owners being preſent, and the other abſent, and the *preſent* owner adduce evidence againſt the murderer, in this caſe, upon the abſentee appearing, he alſo is required to adduce evidence. If, alſo, the murderer adduce evidence to prove that the abſentee has remitted the retaliation, in this caſe the owner preſent is litigant, and the murderer is therefore under no neceſſity of again adducing evidence upon the abſentee appearing, for the reaſons ſtated in the preceding examples.

in caſe
remiſſion by
[illegible] heir.

If the heirs of the perſon murdered be *three*, and two of them give evidence againſt the third, that "he has remitted the retaliation," their evidence ſo given is null, but the retaliation is conſidered as being remitted *by theſe two*; becauſe, in bearing evidence as above, they *acknowledge* retaliation to have been remitted, and their acknowledgment, ſo far as it affects themſelves, muſt be credited.—(The nullity of the evidence, in this inſtance, is becauſe of its tending to the advantage of the witneſſes, as converting *retaliation* into *property*.)—It is to be obſerved that the caſe here conſidered may occur in four different ſhapes.—First, where the murderer confirms the evidence of the two heirs in queſtion, and the third heir denies it, in which caſe a fine of blood is due among the three, in equal ſhares; becauſe the murderer, in confirming the evidence of the two heirs, makes an acknowledgment of two thirds of the fine in their favour; and he at the ſame time claims that "the right of the *third* heir has "dropped, in conſequence of the remiſſion granted by the others," a plea which is reſiſted by the third heir, and cannot be eſtabliſhed by the teſtimony of the others, inaſmuch as their evidence is null,—whence he owes an atonement to this heir likewiſe, namely, a third of the fine.—Secondly, where both the murderer and the third heir confirm the evidence of the two heirs,—in which caſe two thirds of the fine of blood go to the two teſtifying heirs, for the reaſon already mentioned; but the third heir gets nothing whatever, as in confirming the evidence of the other two he acknowledges a remiſſion, and is therefore not entitled to any thing.—Thirdly, where the murderer and the third heir both deny the truth of the evidence,—in which caſe the third heir is entitled to one third of the fine of blood;—but the two teſtifying heirs get nothing whatever; for as they have acknowledged, againſt themſelves, that retaliation has ceaſed, they muſt be credited;—but they at the ſame time claim that the ſhares of each have been converted into property*; and a claim cannot be admitted unleſs ſupported by proof, which with reſpect to them does not appear, as their teſtimony does not ſerve for proof in their own cauſe. The ſhare of the *third* heir, on the contrary, is conſidered as being converted into property upon the force of their allegation, as that is ſufficient proof with reſpect to *him.*—FOURTHLY, where the third heir confirms the evidence of the other two, and the murderer denies it,—in which caſe the murderer owes a third of the fine to the third heir; becauſe, in denying the evidence of the two, he acknowledges that the right of retaliation had ceaſed in conſequence of the remiſſion of thoſe two *alone*, and that the ſhare of the *third* is ſtill due in *property.* It is to be obſerved, however, that this heir, on receiving ſuch third, muſt make it over to the other two; becauſe they claim two thirds of the fine of blood for themſelves, and the murderer denies their claim in point of *property*, but acknowledges a *fine* to be due to the third heir, as having acknowledged that the right of retaliation has ceaſed in conſequence of the avowal of the other two heirs, at the ſame time that the ſhare of the third became converted into *property*. Whatever, therefore, the murderer acknowledges in behalf of the third heir, he [the third heir] acknowledges in behalf of the other two, in having confirmed their teſtimony;—in the ſame manner as where a perſon makes an acknowledgment of a thing as being due to another, and that other declares the thing to belong, not to *himſelf*, but to a *third* perſon; in which caſe the article goes to that third perſon; and ſo here likewiſe. This proceeds upon a favourable conſtruction of the LAW. Analogy would ſuggeſt that nothing whatever is in this caſe incumbent on the murderer, as the two teſtifying heirs advance a claim for property, which the murderer reſiſts, at the ſame time making an acknowledgment in favour of the third heir, which he [the third heir] denies, whence it would appear that nothing is due to him. He, however, gets a third of the fine, on a favourable conſtruction of the LAW, as above ſet forth,—the ground of which is, that the third heir does not *completely* deny, but paſſes the matter to the atteſting heirs, and acknowledges the property in queſtion to be their right.

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* By this phraſe is to be underſtood "*commuted for*

Evidence to a perſon's *a* proves the perſon who inflicted it to be guilty of *murder*.

If witneſſes give evidence that "a certain perſon had wounded "another with a weapon ſo as to render him bedridden until at length "he died," retaliation is in this caſe incurred by the perſon who inflicted the wound;—for whatever is eſtabliſhed upon the teſtimony of witneſſes is (as it were) eſtabliſhed by *actual ſight*; and as, where a murder is *actually ſeen*, retaliation follows, ſo here likewiſe. Evidence to wilful murder is, moreover, eſtabliſhed after this manner; as death cannot be aſcertained to have been occaſioned by any particular wounds, but from the circumſtance of the wounded perſon having been thereby rendered bedridden until he died.

Any eſſential diſagreement in the teſtimony of the witneſſes ren- the whole evidence null.

If two witneſſes to murder diſagree in their teſtimony concerning the *time* of the fact, (one ſtating that the murder was committed on a particular day, and the other that it was committed on *another* day,) or the *place*, (one ſtating that it was committed in *ſuch* a place, and the other that it was committed in *another* place,)—or the *inſtrument*, (one ſtating that it was committed with a *weapon*, and the other that it was committed with a *ſtick*,) their evidence is altogether null; becauſe the murder to which they teſtify is a ſingle act; and the murder committed in one place cannot be the murder committed in *another* place; nor is a murder committed with a *ſtick* the ſame as with a *weapon*, the former being only *manſlaughter*, whereas the latter is *wilful murder*, and theſe two are ſubject to different rules:—hence the teſtimony of each can only be regarded as a ſeparate evidence to a diſtinct fact; and the teſtimony of one witneſs cannot be admitted. In the ſame manner alſo, if one of the witneſſes teſtify that "the murder was committed with a *ſtick*," and the other that " it is unknown with what inſtrument it was committed,"—their evidence is null; becauſe evidence to a murder committed with a *ſtick* tends to prove only murder in a reſtricted ſenſe, (as it amounts merely to evidence of manſlaughter,) whereas evidence to *poſitive murder* applies generally, that is, to murder in its moſt *extenſive* (not in a *reſtricted)* ſenſe;—and the one being altogether different from the other, the teſtimony of each is therefore ſeparate evidence to a diſtinct fact.

Evidence to a murder, which proves only *manſlaughter*

IF two perſons give evidence that " a certain perſon has killed " another perſon, but it is unknown with what inſtrument," a fine of blood is in this caſe due [from the alleged murderer,] on a favourable conſtruction. Analogy would ſuggeſt that the evidence is not to be credited, as bloodſhed bears a different conſtruction according to the difference of the inſtrument; and therefore the matter teſtified to (namely, *murder*) is here uncertain; whence the evidence cannot be credited. The reaſon, however, for a more favourable conſtruction is, that as the witneſſes here teſtify to a murder *unreſtrictedly*, the leaſt of the two different penalties in caſes of bloodſhed (namely, *fine)* is therefore declared due, out of caution. As, moreover, the inſtrument is here dubious, no one in particular can be proved. It is to be obſerved that in this caſe the fine is due from the *murderer*, (not from his *Akilas*,) becauſe all acts are ſuppoſed *wilful*, unleſs they be proved otherwiſe. Here, moreover, the evidence is given to bloodſhed *unreſtrictively*, whence there is a doubt with reſpect to *miſadventure*; and a dubious point cannot be eſtabliſhed.

Evidence to a murder in

IF two perſons, reſpectively, make acknowledgment of their having murdered a particular perſon, and the heir of the murdered perſon alſo aſſert the ſame, he is at liberty to put them both to death; whereas, if two perſons bear evidence to a man's having murdered a particular perſon, and two others atteſt that *another* had murdered that perſon, and the heir aſſert that they had both murdered him, the evidence of both parties is null. The difference between acknowledgment and evidence, in this inſtance, is that in conſequence of both acknowledgment and teſtimony it is proved that each, reſpectively, was guilty of the murder, and each is accordingly liable to retaliation independant of the other. In the *former* inſtance, however, the heir (in whoſe favour the acknowledgment is made) falſifies the acknowledgment with reſpect to a part of what is acknowledged,—whereas, in the *ſecond* inſtance, he falſifies the teſtimony of the witneſſes with reſpect to a part of the evidence they have delivered on his behalf;—and the falſification of a *part* of an acknowledgment by the perſon in whoſe favour the acknowledgment is made does not invalidate the remainder,—whereas the falſification of any part of evidence, by the perſon in whoſe behalf it is delivered, invalidates the whole; for falſification is a reprobation *; and the circumſtance of a witneſs being *reprobate* is obſtructive to the reception of his evidence,—but the ſame circumſtance is no obſtacle to the validity of an acknowledgment.

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* The literal meaning is "*falſification renders reprobate*;" that is, deſtroys a perſon's credit by calling his veracity in queſtion.—So much *technical* matter occurs here that it is difficult to render the paſſage into intelligible Engliſh.

# CHAP. V.

## Of the Circumſtances under which Murder takes place.

Caſe of ſhooting at a

comes *apoſtate.*

IF a perſon ſhoot an arrow at a *Muſſulman*, and the *Muſſulman* apoſtatize, and the arrow then hit and kill him, the ſhooter is reſponſible for a fine of blood, according to *Haneefa*. The two diſciples maintain that the ſhooter is not, in this inſtance, reſponſible for the fine, as the life of the *Muſſulman* in queſtion had loſt its value by his apoſtacy. The argument of *Haneefa* is, that as reſponſibility attaches in conſequence of ſhooting the arrow, regard muſt therefore be paid to the time of ſhooting it; and as, at that time, the life of the *Muſſulman* was valuable, the atonement (that is, the fine) is conſequently due from the ſhooter, notwithſtanding the deed was wilful *, as retaliation is in this caſe remitted becauſe of doubt,—the perſon in queſtion not being of protected blood at the time the arrow reached him.

A

who, in the interim, *re-*

IF a perſon ſhoot an arrow at an apoſtate, and the apoſtate become a *Muſſulman*, and the arrow then hit and kill him, the ſhooter is not liable to any fine, according to all our doctors; (and ſo likewiſe, if a perſon ſhoot an arrow at a hoſtile infidel, and the infidel become a *Muſſulman*, and the arrow then hit and kill him;) for as the ſhooting at the perſon, whilſt an apoſtate or a hoſtile infidel, was not an occaſion of reſponſibility, becauſe of his not being then in a ſtate of protection, it follows that it does not become ſo afterwards.

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* In caſes of *wilful* murder the fine is in general due (*not* from the *murderer*, but) from the murderer's *Akilas*.

If a perſon ſhoot an arrow at a ſlave, and the ſlave be emancipated by his maſter, and the arrow then hit and kill him, the ſhooter is reſponſible to the maſter for the value of the ſlave, according to *Haneefa* and *Aboo Yooſaf*. *Mohammed* ſays that an eſtimate is in this caſe to be made of the value the ſlave bore before the arrow was ſhot, and his value afterwards; and that the ſhooter is reſponſible to the ſlave's maſter for the difference; becauſe the manumiſſion precludes the conſequence of the offence;—in the ſame manner as where a perſon undeſignedly ſtrikes off the hand of a ſlave, and his maſter afterwards emancipates him,—in which caſe the manumiſſion precludes the conſequence, inſomuch that neither the fine of blood nor the value of the ſlave are due, nor (in ſhort) any thing except a mulct for the hand, and the difference occaſioned in the value of the ſlave; for here it is uncertain who the claimant of right is, as at the time of the offence it was the maſter, and at the time of the conſequent death it was the ſlave, he being then free. The emancipation of the ſlave, therefore, operates the ſame as his recovering from the wound;—and the conſequence being precluded, nothing remains except the ſhooting; and as this alſo is an offence, (ſince it tends to leſſen the value of the ſlave ſhot at,) the ſhooter is conſequently reſponſible for the difference of value thereby created. The argument of the two *Elders* is that the ſhooter is guilty of murder from the inſtant of his ſhooting; for he, in fact, does nothing more than merely ſhoot; but as this is a matter which was at that time purely optional and in his power, he is conſequently reſponſible for the value of the ſlave. It is otherwiſe where a perſon undeſignedly ſtrikes off the hand of a ſlave, and the wound proves fatal after he [the ſlave] has been emancipated; for here the offender has deſtroyed a *part* of the ſubject, which occaſions a reſponſibility to the maſter;—and if, upon the wound proving fatal, any thing remain due, it is due on behalf of the *ſlave*, he being then free. In this inſtance, therefore, the ſtate of the caſe in the *beginning* is different from what it is in the *end*, being ſimilar to where the ſubject undergoes a complete change; and as, where the ſubject is changed, the mortal conſequence is not eſtabliſhed at the firſt, ſo here likewiſe. The mere ſhooting of the arrow, on the contrary, is not a deſtruction of any thing previous to its reaching the ſlave, the only effect of it upon the ſubject being to leſſen its value in the eyes of mankind from the danger it is thus expoſed to,—a circumſtance not worthy of any regard. No atonement, therefore, is due on account of the mere *ſhooting*. Upon the arrow, however, reaching the ſubject, the ſhooting of it becomes the efficient cauſe of reſponſibility, which, when the arrow takes place, is referred to the act of ſhooting. In this inſtance, therefore, there is no difference between the *beginning* and the *end*, the ſhooting being conſidered as *murder* alone, and not *a wound, fatal in its conſequence*; and accordingly, the value of the ſubject [the ſlave] is due on behalf of the maſter.

IF the magiſtrate pronounce upon any perſon a ſentence of lapidation [for whoredom,] and one of the byſtanders ſhoot an arrow at this perſon, and one of the witneſſes then retract from his teſtimony, and then the arrow take place, the ſhooter is not reſponſible for any thing; for regard is here paid to the time of ſhooting the arrow; and the blood of the perſon condemned was at that time in a neutral ſtate.

ing at a con demned criminal, who in the interim, ſtands acquitted.

# *HEDAYA.*

## BOOK L.

## Of *DEEÀYAT*, or FINES.

ion of

*DEEAYAT* is the plural of *Deyit*, which ſignifies the fine exacted for any offence upon the perſon.

Chap. I. Introductory.
Chap. II. Of Nuiſances placed in the Highway.
Chap. III. Of Offences committed *by* or *upon* Animals.

Chap. IV. Of Offences committed *by* or *upon* Slaves.
Chap. V. Of Offences committed by uſurped Slaves, or Infants, during the Uſurpation.
Chap. VI. Of *Kiſſàmit*, or the adminiſtration of Oaths.

## CHAP. I.

Manſlaugh ter re an *hea* and the performance of an expiation by the

In caſes of manſlaughter an heavy[*] fine is due from the *Akilas* [of the ſlayer;] and it is incumbent on the ſlayer to perform expiation.—The expiation for manſlaughter (and alſo for homicide by miſadventure) conſiſts in the emancipation of a *Muſſulman* ſlave, (provided, however, that he be free from all perſonal defects;) or, if ſuch a ſlave cannot be procured, in obſerving a faſt for two months ſucceſſively.—With reſpect to the diſtribution of *alms*, it does not conſtitute an expiation in caſes of homicide, as in caſes of *Zihár*[†]; becauſe the above two modes of expiation for homicide are particularly ſpecified in the KORAN, whereas the expiation of *Zihár* is there mentioned to be ſufficiently performed by the diſtribution of alms, as well as by the other two modes.) It alſo ſuffices, for an expiation, that the ſlayer emancipate an infant at the breaſt[‡] whoſe father or mother is a believer, ſince ſuch infant is a *Muſſulman* in effect[§],—and its members (ſuch as the hands, feet, eyes, &c.) are all apparently perfect:—but it does not ſuffice to emancipate an embryo yet in the womb, ſince its exiſtence, as well as the perfectneſs of its frame, are unknown and uncertain.

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[*] Arab. *Moghàllizh*. It is particularly defined a little further on.

[†] See Vol. I. p. 332.

[‡] Arab. *Ràzzi*; meaning an infant not yet weaned: a *ſuckling*.

[§] Becauſe an infant is a *Muſſulman* in dependance of its parent.

fine for manſlaughter conſiſts of one hundred fe [illegible]

The *heavy* fine for manſlaughter conſiſts, according to *Haneefa* [illegible] *Yooſaf*, of one hundred female camels, in four lots or claſſes, namely, twenty-five of one year, twenty-five of two years, twenty-five of three years, and twenty-five of four years. *Mohammed* maintains that it conſiſts of one hundred female camels, in *three* lots; namely, thirty of three years, thirty of four years, and forty (pregnant ones) of five years; becauſe the prophet has ſaid, "*A perſon* "*who dies of ſcourging or the baſtinado is ſlain by* MANSLAUGHTER*, "*which requires an expiation of one hundred camels, forty of them* "*pregnant*;"—and alſo, becauſe manſlaughter requires an *heavy* fine, which the number in queſtion amounts to. The two *Elders*, in ſupport of their opinion, argue that the prophet in general terms ordained one hundred camels to be the mulct for bloodſhed;—and with reſpect to the ſaying quoted by *Mohammed*, it is of no weight; for the companions have differed concerning the amount of the fine, which would not have been the caſe had it been eſtabliſhed (as it *muſt*) by that authority. It is to be obſerved, however, that this aggravation † of the fine for manſlaughter holds only where it is paid in camels;—for if the magiſtrate decree it to be paid in money, no more than ten thouſand *dirms*, or one thouſand *deenars*, can be impoſed in aggravation; becauſe, when paid in this mode, the amount has been particularly ſpecified by the lawgiver.

or (when paid in money) of ten thouſand *dirms*, or one thouſand *deenars*.

The fine for homicide by [illegible] of

In caſes of homicide by miſadventure a fine is incumbent upon the *Akilas*, and expiation upon the ſlayer. The fine, in this inſtance, conſiſts of one hundred camels in five lots; twenty females of one year, eighty camels twenty

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* That is, ſuppoſing thoſe to be inflicted *unjuſtly*, or *without authority*.

† Previous to the time of the prophet the fine for bloodſhed was only *ten* camels.

twenty of two years, twenty of three years, twenty of four years, and twenty males of one year; becauſe ſuch was the fine decreed by the prophet in this inſtance; and alſo becauſe in this mode the fine is leaſt burthenſome, and an alleviation ought to be granted in a caſe of *e*, ſince the ſhedder of blood there ſtands excuſable.

Difference of opinion concerning the rate of a *pecuniary* fine.

A FINE of *gold* is one thouſand *deenars*, and that of ſilver ten thouſand *dirms*, (as mentioned above.) *Shafeï* maintains that the fine of ſilver is twelve thouſand *dirms*. Our doctors, in ſupport of their opinion, quote the authority of *Omar*. In fact, this difference of opinion ariſes ſolely from a difference in the *weight* or *rate* of the *dirms* *.

It is not payable in any other mode than by *camels* or *current coin*.

A FINE is not paid in any other than the above three modes, namely, in camels, *deenars*, or *dirms*. The two diſciples maintain that it may be paid not only in theſe, but alſo in kine, (two hundred,) or in goats (two thouſand,) and alſo in cloaths, (two hundred ſuits.) It is alſo remarked in the *Mabſoot*, under the head of *Fines*, that "if "the avenger of blood compound the matter for *more* than two hun-"dred kine, or two hundred ſuits of clothes, it is unlawful;" and as no diſſent is there noticed on the part of *Haneefa*, it hence follows that *he* alſo admits the payment of a fine in clothes or kine, as well as the two diſciples.—This is approved.

The fine for a

THE fine for a woman, whether for the *perſon* or the *members*, is half the fine for a man. *Shafeï* maintains that in all caſes of offence againſt the *members* of the body, where the fine is rated at one third of the fine of blood, or leſs, a man and woman are equal; but that where it *exceeds* a third, up to the complete fine, that for a woman is only in half the proportion. The argument of our doctors is that the prophet has ſaid, "*The fine for a woman is half the fine for a man;*" and as this precept is thus unreſtrictedly expreſſed, it therefore comprehends all caſes, and is conſequently a ſufficient refutation of *Shafeï*'s opinion. Beſides, the *rank* of a woman is lower than that of a man, and ſo likewiſe her *faculties* and *uſes*; and as an effect of this appears in the fine for a woman's perſon, (that being only *one half*, according to all authorities,) ſo in the ſame manner it is one half for the members, as well as for the perſon,—and the ſame in all caſes where it exceeds one third of the whole.

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* The tranſlator omits, in this place, a long and perfectly uſeleſs diſcuſſion concerning the relative weight and value of *dirms* at different times.

and that for a *Zimmee* is the ſame as for a *Muſſul-*

The fine for a *Zimmee* is the ſame as for a *Muſſulman*. *Shafeï* ſays that the fine for a *Jew* or a *Chriſtian* is four thouſand *dirms*, and for an idolator ſix hundred. *Malik*, on the other hand, ſays that the fine for a *Jew* or a *Chriſtian* is half the fine for a *Muſſulman*. Our doctors, however, ſupport their opinion upon a ſaying of the prophet, "*The fine for every* ZIMMEE *is one thouſand* DEENARS," which precept, being generally expreſſed, places all upon an equality.

## SECTION.

### *Of* FINES *for Offences not affecting* LIFE.

A complete fine is required for the noſe, the tongue, or the mem-

The cartilage of the noſe requires a complete fine; and ſo likewiſe the tongue and the virile member; becauſe the prophet has ſaid, "*A fine is due for life, and for the noſe, and for the tongue.*" It is, moreover, a rule, with reſpect to the members of the body, that where one of the faculties [bodily or mental] is deſtroyed, or the beauty of the countenance effaced, a complete fine is due; becauſe this is a deſtruction of the perſon, in *one* ſhape, which is held tantamount to a deſtruction of it in *every* ſhape, out of reſpect to MAN.

IF the bone of the noſe be ſtruck off, together with its cartilage, ſtill a *ſingle* fine only is due, and no more, the whole forming only one member. In the ſame manner alſo, if the whole tongue be cut out, a ſingle fine is due, as a deſirable faculty (namely, *ſpeech*) is thereby loſt. A complete fine is likewiſe due if a *part* only of the tongue be cut off, provided the power of ſpeech be utterly deſtroyed, for in this caſe the moſt deſirable uſe of the tongue is loſt, notwithſtanding the *inſtrument* of ſpeech ſtill remain. Lawyers, however, have remarked that if the perſon continue to poſſeſs the power of pronouncing *ſome* of the letters, the fine is levied proportionably.—(Some hold that it is in this caſe to be levied in the proportion which the *dental* letters bear to the reſt.)—Lawyers alſo ſay that if the perſon be ſtill capable of pronouncing moſt of the letters, the fine muſt be determined by arbitration *; becauſe the uſe of ſpeech is to communicate ideas, which end is ſtill anſwered;—but yet an impediment is occaſioned in the utterance, which requires an equitable recompence.—If, on the contrary, the perſon be rendered incapable of pronouncing moſt of the letters, a complete fine is due, ſince here it is evident that the uſe and intention of ſpeech is not obtained.

and alſo, for a *part* of the tongue, if the power of ſpeech be deſtroyed; (or, in proportion as it may be injured;)

IF a man hit another a blow upon the head, ſo as to deprive him of reaſon, a complete fine is due, as the perſon is thereby deprived of the power of attending either to his temporal or eternal concerns. So likewiſe, if a perſon be by a blow deprived of any of the ſenſes, ſuch

and for a blow which, in its conſequence, or of any of his ſenſes;

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* Arab. *Yawjibo Hakoomit-al-adil*; literally, "*an award of equity is due.*" *al-adil* (the award of equity) is a technical phraſe, which occurs frequently in the ſequel, and is ſometimes rendered, by the tranſlator, *an arbitratory atonement.*

as ſeeing, hearing, ſmelling, or taſting, a complete fine is due, all theſe being deſirable faculties;—and it is, moreover, related of *Omar*, that he impoſed a quadruple fine for a ſingle blow, in a caſe where it had deprived the perſon of reaſon, and of the power of ſpeech, ſight, and hearing.

and for the *beard* or the hair of the ſcalp.

If a perſon tear out the beard of another, ſo as that it never afterwards grows, a complete fine is due, becauſe the beauty of the countenance is hereby effaced; and the ſame is likewiſe due for tearing out the hair of the head (ſo as to prevent its future growth) for the ſame reaſon. *Shafeï* maintains, that for the hair of the beard or head an arbitrary fine only is due, becauſe thoſe are not an original part of man, but ſupervenient and excrementitious, inſomuch that in many countries it is cuſtomary to cut them off. The argument of our doctors is, that the beard is ornamental to the human countenance, and neceſſary to its beauty; and as, by the deprivation of it, beauty is conſequently effaced, a fine is due for it, in the ſame manner as for cutting off the cartilage of the ear, and for the ſame reaſon;—and ſo likewiſe of the hair of the head. With reſpect to the beard of a *ſlave*, it is recorded from *Haneefa*, that the penalty for tearing it out is the full value of the ſlave. According to the *Záhir Rawáyet*, however, nothing more is due than merely the defect occaſioned in his value; becauſe the uſe of a ſlave is to *work* and perform *ſervice*, which does not require beauty.

(Fine for the *whiſkers*

If a perſon tear out the whiſkers of another, ſo as that they never afterwards grow, an arbitratory atonement is due. This is approved; becauſe, as the whiſkers are a dependant of the beard, the tearing them out is therefore ſubject to the ſame rule as tearing out a *part* of the beard.

IF a perſon tear out the hair of another's eye-brows, a complete fine is due; and half a fine for tearing out the hair of *one* eye-brow.—According to *Málik* and *Shafeï* an arbitratory atonement is due in this inſtance. The arguments have been recited at large in treating of the beard.

or *eye*

A COMPLETE fine is due for the two eyes, the two hands, the two feet, the two lips, the two ears, and the two teſticles;—and for *one* of either an half fine is due; becauſe the prophet wrote a letter to *Omar*, ſignifying that "*for the two eyes a complete fine is due, and an* "*half fine for one eye*;" and alſo, becauſe, as by the loſs of both the fellow members, in the inſtances above mentioned, either one of the faculties is deſtroyed, or beauty is totally effaced, a complete fine is conſequently due; and as, by the loſs of one of them, an half of the faculty is deſtroyed, or an *half* of the beauty effaced, an *half* fine is therefore due.

A complete fine is likewiſe required for any two fellow-parts or fellow-members of the body; and an *half* fine for any *one* of them;

FOR the two breaſts of a woman a complete fine is due; and an half fine for one breaſt, for the reaſon before mentioned. For the two nipples, alſo, of a woman's breaſts a complete fine is due; and for one of them a half fine; becauſe the faculty of preſerving the milk and giving ſuck is completely deſtroyed in the former inſtance; and it is alſo deſtroyed in one half in the latter inſtance.

and the f.
for the br
or nipples of
a *woman*;

FOR the four eye-lids a complete fine is due; and for any one of them a quarter of the complete fine; becauſe by the loſs of the whole beauty is completely effaced, and a natural advantage is alſo loſt, namely, that of preſerving the eyes from external ſubſtances. As, therefore, a complete fine is due for the *whole*, being four in number, a quarter of a fine is conſequently due for one, an half for two, and three quarters for three;—and it is the ſame whether the whole eye-lid be taken off, or only the eye-laſh and edge of the lid.

and alſo for the *four* eye-lids.

ine is re-quired

For each of the fingers or toes a tenth of the fine is due; becauſe the prophet has ſaid, "*Ten camels muſt be paid for a finger*;" and alſo becauſe, by the loſs of all the fingers or toes, one of the faculties (namely, walking or holding) is completely deſtroyed, for which a complete fine is due; and as the fingers (or toes) are ten each, the fine is therefore divided into ten equal parts, one of which is due for each reſpectively. It is to be obſerved that in this reſpect all the fingers (and toes) are alike, the ſaying above quoted being unreſtrictedly expreſſed. Beſides, all the fingers are alike in their original purpoſe, in the ſame manner as the right-hand and the left.

fine for toe being in proportion to their number,)

In every finger (or toe) conſiſting of three joints, a third of the fine for the whole finger is due for each joint; and in every finger of two joints an half of the fine for the finger; for in the ſame manner as the fine for the two hands is divided among the fingers, ſo likewiſe is the fine for each finger divided among its joints.

*eth for a tooth.*

The fine for each tooth is five camels,—that is, a twentieth of complete fine, the prophet having thus ordained. It is to be obſerved, moreover, that all the teeth are in this reſpect alike; becauſe the ordinance here mentioned is abſolute; and all the teeth are, moreover, alike in their original purpoſe, in the ſame manner as the fingers or toes.—This is where the deprivation has been effected by *miſadventure*;—for, where it is *wilful*, retaliation is due in all thoſe inſtances as has been already mentioned in treating of offences againſt the perſon.

An half fine tion of the *uſe* of a member;

If a perſon ſtrike the member of another, ſo as to deſtroy the uſe of it, the member itſelf ſtill remaining, an half fine is due;—(as in the caſe, for inſtance, of cauſing a perſon's hand to wither, or blinding an eye;) becauſe the fine is incurred by deſtroying the uſe of the member, as well as by a deprivation of the member itſelf.

IF a perſon ſtrike another on the loins, ſo as to deſtroy his power of ſecreting *ſemen*, a complete fine is due, this amounting to a complete deſtruction of one of the faculties.

and a complete fine the deſtr tion of any of the faculties,

IF a perſon ſtrike another on the back, ſo as to make him crooked, [back-broken,] a complete fine is due, as the beauty of the perſon is thus completely deſtroyed. If, however, the perſon afterwards recover his carriage, ſo as to retain no ſign of the injury, nothing whatever is incurred.

or of the beauty of the perſon.

## SECTION.

## *Of* SHADJA, *or Wounds and Cuts from the Crown of the Head to the Chin.*

(*Málik* maintains that the cheek bones are not included in the *face*, as they do not form a part of what is properly termed the *viſage*. Our doctors, however, include them in the face, both as they are annexed to it, and alſo becauſe they, in fact, conſtitute a part of the whole countenance.)

OF *Shàdja* wounds there are ten: I. *Hàriſá*; or a ſcratch, ſuch as does not draw blood: II. *Dàmiá*; or a ſcratch, ſuch as draws blood, but without cauſing it to flow: III. *Dameeá*; or a ſcratch, ſuch as cauſes the blood to flow: IV. *Bàziá*; or a cut through the ſkin: V. *Motàhmilá*; or a cut into the fleſh: VI. *Simhàk*; or a wound reaching to the pericranium: VII. *Màwzihá*; or a wound which lays bare the bone: VIII. *Hàſhimá*; a fracture of the ſkull: IX. *Moonàk-*

wounds are of ten de-

*kilá*; a fracture which requires a part of the ſkull to be removed: X. *Ammá*; or a wound extending to the membrane which incloſes the brain.—Next follows *Dàmighá*, or a wound which penetrates to the brain; which, however, is not included among the others, as a perſon ſo wounded cannot poſſibly continue alive.

Retaliation is inflicted only in the caſe of a cut (wilfully given) which lays bare the bone.

In the caſe of a wound of the *ſeventh* deſcription [*Màwzihá*] retaliation is due, provided the wound was wilfully given; becauſe it is recorded of the prophet that he decreed retaliation for ſuch a wound; and alſo, becauſe it is here practicable to obſerve an equality in the retaliation, ſince it is poſſible to cut the offender to the bone with a knife. Retaliation is therefore due in this inſtance;—but it is not to be inflicted in any of the other caſes above deſcribed, as in thoſe there is no determinate limit to which to cut with a knife; and beſides, in all wounds *above* the ſeventh deſcription the bone is fractured; and there is no retaliation for fractures. In wounds ſhort of the ſeventh deſcription an award of equity is due, as thoſe have no ſpecific limit, and yet cannot lawfully be ſuffered to paſs without penalty.

for *Shàdja* given by *miſadventure*.

In the caſe of a *Màwzihá* wound inflicted by *miſadventure*, a twentieth of the complete fine is due. For a *Hàſhimá* wound a tenth of the complete fine is due; for a *Moonàkkilá* three twentieths; and for an *Ammá* a third;—whether they be inflicted wilfully or accidentally. (A third of the fine is alſo due for a *Jàifá*, or ſtab,—that is, a wound penetrating into the cavity of the trunk, from the breaſt, the back, the belly, or the ribs, or from the neck into the gullet;—and if it penetrate quite through, from ſide to ſide, it is accounted as *two* ſtabs, and two thirds of the fine are accordingly due for it; becauſe the prophet has ſaid, "*Five camels are due for a* MAWZIHA *wound,* "*ten for a* HASHIMA, *fifteen for a* MOONAKKILA, *and a third of the* "*complete fine for an* AMMA *and a* JAIFA;" and alſo, becauſe where the wound extends *quite through*, it ſtands, in effect, as two ſtabs, one on one ſide, and one on the other; and as a third of the fine is due for each ſtab, it follows that *two* thirds are due in this inſtance.)

All other wounds are atonement

Mode of determining ſuch atonement.

THE ten deſcriptions of wounds here treated of are reſtricted ſolely to the *head* and *face*, as has been already mentioned. With reſpect to wounds on the other parts of the body, which are termed *Jiràhit*, and for which no ſpecific mulcts have been appointed, they require an arbitratory atonement, where the bone is either fractured or laid bare, provided a laſting ſcar or deformity be occaſioned; becauſe although ſpecific mulcts have been appointed only for wounds of the head or face, yet the offences in queſtion cannot lawfully be ſuffered to paſs without penalty; and alſo, becauſe the particular appointment of a mulct is on account of the defect occaſioned by a ſcar, which is a defect only where it occurs upon the head, or in the face. With reſpect to the arbitratory atonement to be awarded in this inſtance there is a difference of opinion. *Tabàvee* ſays that it is to be determined by the difference between the value which the wounded perſon would bear (ſuppoſing him to be a ſlave) *without* the ſcar, and that which he bears *with* the ſcar; and if the difference be equal to a twentieth of the former value, a twentieth of the fine muſt be awarded; if a tenth, a tenth of the fine; and ſo forth. (Decrees paſs according to this.) *Koorokhee*, on the contrary, ſays that the atonement muſt be adjuſted by the proportion which the wound in queſtion bears to a *Màwzihá* wound;—in other words, if it amount to an *half* of a *Màwzihá* wound, the half of a *Màwzibá* fine is due; if to a quarter, a quarter is due; and ſo forth. This, however, is rejected, as it is ſcarcely poſſible thus to meaſure the wound.

## SECTION.

An half fine is due for all the fingers of either hand;

For the fingers of one hand an half of the complete fine is due; becauſe, as the fine for each finger is a tenth, (as has been before mentioned,) it follows that for five of them the fine is five tenths; and alſo becauſe, as for cutting off *all* the fingers, one of the faculties being thereby deſtroyed, (namely, that of carrying,) a complete fine is due, ſo in like manner, half the faculty being deſtroyed by cutting off the fingers of one hand, an half fine is conſequently due. If, alſo, the fingers of one hand be cut off, together with a part of the *metacarpus*, ſtill an *half* fine only is due; becauſe the prophet has ſaid, "*for the two hands a fine is due, and* HALF *the fine for one hand*;" and alſo, becauſe the *metacarpus* is merely a dependant of the fingers, as it is upon the latter ſolely that the power and faculty of *carrying* or *taking hold of* any thing depends.

and no more, although a part of the hand be ſtruck off;

but if a part of the lower arm be ſtruck off, an arbitratory atonement is alſo due.

If the hand be ſtruck off, together with a part of the lower arm, an half fine is due for the hand, and an arbitratory atonement for the part of the arm, according to *Haneefa* and *Mohammed*, and alſo according to one opinion of *Aboo Yooſaf*. There is another opinion recorded from him, that any thing beyond the hand or foot, to the ſhoulder or the hip, is merely a dependant; and that nothing whatever is incurred for the leg or arm; as the LAW has appointed an half fine for a *hand*, [*Yed*,] which ſignifies the whole limb up to the ſhoulder, whence nothing more can legally be impoſed. The arguments of *Haneefa* and *Mohammed* upon this point are twofold.—FIRST, the hand is the inſtrument of ſeizing and carrying; and as thoſe acts depend upon the hand and fingers, not upon the arm, the latter therefore is not a dependant of the former with reſpect to compenſation.—SECONDLY, the *hand* intervenes between the fingers and the arm,—whence the arm cannot be conſidered as a dependant of the fingers;—neither is it a dependant of the hand, as that is itſelf a dependant of the fingers, and a dependant cannot have a ſecondary dependant.

For a defective hand a fine is due in proportion to its defect.

IF a hand be ſtruck off having only one finger, a tenth of the fine is due; or, if it have two fingers, a fifth; and ſo forth; and nothing whatever is due for the *metacarpus* in either caſe[*]; becauſe the fingers are the original, and the *metacarpus* the dependant, not only in reality, but alſo in the eye of the LAW;—in *reality*, as the power of ſeizing and carrying depends upon the fingers; and alſo in the eye of the LAW, becauſe that has appointed a fine for the *fingers*, not for the *metacarpal* part of the hand.

An award of equity is due for a redundant finger;

FOR a redundant finger (that is, a *ſixth*) an award of equity is due, out of reſpect to MAN; for that alſo is a part of the perſon, although it be neither uſeful nor ornamental. The ſame rule alſo obtains with reſpect to a redundant tooth; and for the ſame reaſon.

and alſo for the eye, yard, or tongue of an infant.

AN award of equity is due for the eye, the yard, or the tongue of an infant ſo young as that the perfectneſs of theſe members in him cannot be aſcertained. *Shafeï* maintains that a complete fine is due for thoſe, in the ſame manner as for the cartilage of the noſe of an infant, or the ear, the perfectneſs of them being the moſt probable concluſion. The argument of our doctors is, that the chief end of the organs in queſtion is the *uſe* of them; and therefore, where their uſefulneſs cannot be aſcertained, the fine for them is not due, becauſe of a doubt. Beſides, mere *probability* is not a ſufficient ground on which to advance a claim. It is otherwiſe with reſpect to the cartilaginous part of a noſe or an ear; for the chief end of that is beauty, which by the deprivation of it is completely deſtroyed. It is to be obſerved that the perfectneſs of the tongue is known from ſpeaking, that of the yard by the proper ejection of urine, and that of the eye from ſuch ſigns as ſerve to manifeſt that the child ſees objects with it. As ſoon, therefore, as from theſe tokens the perfectneſs of the organs in queſtion is aſcertained, the ſame rules obtain with reſpect to them as in the caſe of adults.

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[*] An objection by *Mohammed* is here omitted, as being utterly frivolous and nugatory.

Retaliation cannot be inflicted for any injury upon the head, of an indeterminate nature;

If a man, either wilfully or by miſadventure, give another a wound upon the head, and he be in conſequence deprived of his reaſon, or loſe the whole of his hair, retaliation is not due upon the ſtriker:—not in the caſe of miſadventure, evidently; nor in the caſe of a *wilful* wound, becauſe equality, in a caſe of this nature, cannot be obſerved in the infliction of the retaliation. A complete fine is therefore due in either inſtance, and the mulct for the wound is therein included:—in the inſtance of loſs of reaſon,—becauſe, as all the faculties of the body are thereby rendered null, the caſe is therefore, in effect, the ſame as where a perſon gives another a wound upon the head, and the wounded perſon dies,—in which inſtance the mulct for the cut is included in the fine,—and ſo here likewiſe;—and in the inſtance of the loſs of the hair,—becauſe the mulct for a wound upon the head is due ſolely on account of its occaſioning a defect, by the deſtruction of a *part* of the hair, (inſomuch that if the hair grow again, as it was before, the mulct is remitted;) and as the complete fine is here due in conſequence of the loſs of *all* the hair, the mulct due for the wound is therein included, as being the leaſt of the two. The mulct is therefore included in the complete fine due on account of the hair, which is the greateſt of the two; for it is a rule that where an offence is committed upon any one member, and two injuries are thereby ſuſtained, and the mulct for the one injury is greater than for the other, the ſmaller is included in the greater;—as where, for inſtance, a perſon cuts off the finger of another, and the whole hand is thereby rendered powerleſs; in which caſe a fine for the hand is due, including the fine for the finger.

IF a perſon wound another upon the head, and thereby deprive him of ſpeech, ſight, or hearing, in this caſe the mulct for the wound is due, together with the complete fine. The reaſon of this is, that each of thoſe privations is a ſeparate offence; and as the advantage of each reſpective organ is reſtricted to that organ, each is, therefore, like a ſeparate member, ſuch as the hand and foot.— It is otherwiſe with the *reaſoning* faculty, that extending to and affecting all the organs, as has been already explained. *Aboo Yooſaf* maintains that the mulct for the wound is included in the fine, in the caſe of a privation of *hearing* or *ſpeech*, but not of *ſight*; becauſe, as the power of hearing or ſpeaking is, like the *reaſon*, a matter of a concealed nature, it is therefore ſubject to the ſame rule; whereas the power of ſeeing, on the contrary, is evident, and not of a concealed nature, and therefore bears no analogy to reaſon in this particular. The former opinion is approved.

but the mulct for the woun is due, over and above the *complete fine* where any of the ſenſes or deſtroyed in conſequence.

IT is recorded, in the *Jama Sagheer*, as an opinion of *Haneefa*, that if a man wilfully wound another upon the head, and thereby put out both his eyes, retaliation is not to be inflicted; and lawyers have, moreover, delivered it as his opinion, that in this inſtance a fine is due for the eyes, and alſo the mulct for the wound. The two diſciples, on the contrary, hold that retaliation is due for the wound, and a fine for the eyes; for as the act took place upon two different parts or ſubjects, it therefore amounts to two ſeparate offences; nor does the apprehenſion of miſadventure with reſpect to the eyes occaſion a remiſſion of retaliation for the wound; in the ſame manner as where a perſon wilfully ſhoots an arrow at another, which paſſing through him hits a ſecond perſon, and they both

Caſe of a blow on the head, occaſioning the loſs of both die; in which caſe retaliation is due for the firſt, and a fine for the ſecond. The arguments in ſupport of the doctrine of *Haneefa* upon this ſubject are twofold.—First, the wound has communicated an additional conſequence. Now the penalty to be inflicted for any thing muſt be the ſame as the thing itſelf: but that is here impoſſible, it not being in the power of men to inflict a wound upon the head in ſuch a way as to be attended with the ſame preciſe effect as the wound in the preſent inſtance. A fine is therefore due for both injuries reſpectively.—Secondly, the act is undoubtedly one; and the ſubjects of it are alſo one, in one ſhape, as being conjunct. The apprehenſion of miſadventure, therefore, with reſpect to the eyes, in the ſecond inſtance, is extended alſo to the *firſt* inſtance,—that is, to the wound; and conſequently occaſions a remiſſion of retaliation with reſpect to that likewiſe. It is otherwiſe in the caſe of ſhooting an arrow; for there the wound [received by the firſt perſon] cannot with propriety be ſaid to have *communicated an additional conſequence**; and the ſubjects are, moreover, totally diſtinct and ſeparate. It is alſo otherwiſe where a perſon cuts off the finger of another, and the knife ſlips, and hitting another finger, cuts off that likewiſe; for in this caſe retaliation is due for the firſt finger, and a fine for the ſecond, as they are two different ſubjects.

If a member periſh in con-
ot a
not incurred, but *fine*.

If a perſon ſtrike off the upper joint of another's finger, and the reſt of the finger, or the hand itſelf, wither in conſequence, retalia- not due, nor any thing except the fine for the joint, and an arbitratory atonement for the remainder. In the ſame manner, if a perſon break off a part of another's tooth, and the reſt of the tooth turn black, retaliation is not due, but he muſt pay the fine for the tooth. If, alſo, in either of thoſe caſes, the injured perſon require retaliation, offering to be ſatisfied with ſtriking off the correſpondent upper joint of the offender's finger, or a part of his tooth, and to remit the remainder, it is not permitted, thoſe acts not being proper ſubjects of retaliation.

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* The term by which this is expreſſed in the original [*Sirrâyat*] will not bear a literal tranſlation.—In its primitive ſenſe it ſignifies to *paſs* or *penetrate*, and alſo to *communicate*, (as a contagion or peſtilence.) This expoſition will ſuffice to explain the meaning of the phraſe.—Where it occurs with a relation to *life* the tranſlator uniformly renders it "*prove* "*fatal*."

Caſe of an injury to o member oc caſioning t loſs of another.

IF a man ſtrike off the finger of another, and the next finger become powerleſs in conſequence, retaliation is not to be inflicted for either, according to *Haneefa*. *Mohammed* and *Ziffer*, on the contrary, maintain that retaliation is due for the firſt finger, and a fine for the ſecond. The arguments on both ſides have been already recited. *Ibn Simmàia* reports, from *Mohammed*, that if a perſon give another a wound upon the head, and deprive him of ſight in conſequence, retaliation is to be inflicted for both the wound and the eyeſight,—the offender, where his offence communicates an additional conſequence, being accounted a perpetrator with reſpect alſo to the ſecondary or occaſional effect thus produced;—in the ſame manner as where a wound is attended with loſs of life; in which caſe the wounder, being accounted a murderer, is liable to retaliation. In the caſe in queſtion, therefore, as the wound in the head is attended with loſs of ſight, the wounder is accounted the perpetrator, or immediate occaſion of ſuch privation; and as ſight is a ſubject of retaliation, retaliation by a deprival of ſight muſt therefore be inflicted. It is otherwiſe where a perſon ſtrikes off another's finger, and the next finger becomes powerleſs in conſequence; for a paralytic affection cannot occaſion retaliation. From this report of *Ibn Simmàia* it appears that, according to *Mohammed*, if a wound extend, in its effects, to any thing for which retaliation is practicable, it muſt be inflicted, in the ſame manner as where a wound, unrightfully inflicted, is attended with loſs of life. The reaſon for the more commonly received opinion above ſet forth, (that retaliation is not inflicted for the eyeſight, when occaſioned by a wound on the head,) is that the loſs of ſight, in the inſtance in queſtion, occurs merely in an *adventitious* way; in other words, the act, in the firſt inſtance, proceeded from the offender, and then occaſioned the loſs of ſight. In the caſe, moreover, of wounds communicating an additional injury, it is a rule that, if the legal effect* of the firſt injury ſtill remain, the ſecond injury is regarded merely as being *occaſional*; whereas if, on the contrary, no legal effect remain, it is conſidered as an immediate conſequence of the offender's act. As, therefore, in the caſe in queſtion, the legal effect of the wound ſtill remains, it [the wound] is conſequently regarded as the intermediate cauſe of the loſs of the eye-ſight, in the ſame manner as the digging of a well in the highway is the intermediate cauſe of homicide;—and retaliation is not inflicted in the inſtance of an intermediate cauſe. It is otherwiſe where a wound is attended with the loſs of life, for as, in that caſe, the legal effect of the firſt injury no longer remains, the ſecond injury is therefore conſidered as an immediate conſequence of the offender's act.

Retaliation is not incurred where the injury received produces any additional and unexpected defect.

If part of a tooth be broken off, and the remainder afterwards fall out, retaliation is not due;—and in the ſame manner, if a perſon give another two wounds upon the head, and the two wounds afterwards become one, retaliation is not due. *Ibn Simmàia* holds that it is due in both inſtances.

Caſes of injury to the

If a perſon ſtrike out another's tooth, and a ſecond tooth grow in its place, the fine for the firſt tooth is remitted, according to *Haneefa*; for here the offence in effect no longer remains, as the uſe and ornament both continue; and the caſe is therefore the ſame as if nothing whatever had been deſtroyed,—this being analogous to where a perſon ſtrikes out the tooth of an infant, which grows again, in which inſtance no fine whatever is incurred.

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* Meaning, the liability of the offender to fine or retaliation.

IF a perſon ſtrike out another's tooth, and this perſon keep the tooth in its place until the gum grow round it, and it remain, after all, unlike to the reſt in point of uſefulneſs or beauty, a fine for the tooth is due from the ſtriker, the growing of the gum round it not being regarded, ſince it is impoſſible that the veſſels and nerve of the tooth ſhould be connected with it in the ſame manner as before.

IF a perſon ſtrike out another's tooth, and this perſon draw a tooth of the ſtriker, in retaliation, and afterwards obtain, by growth, a new tooth, he in that caſe owes the ſtriker five hundred *dirms*, as it then becomes evident that he executed the retaliation unjuſtly, ſince it is the *deſtruction of the root* [the renovating power] which, in the caſe of a tooth, gives cauſe for retaliation; but here it appears that the root ſtill remains, for if it did not, the tooth could not poſſibly grow again. In the caſe in queſtion, therefore, the offence no longer remains, but is utterly done away.—(It is for the reaſon here alleged that, in executing retaliation for a tooth, a delay is obſerved of one year, according to all our doctors.)—Retaliation, however, cannot be executed upon the unjuſt exactor of it in return, becauſe of a doubt; and conſequently a pecuniary recompence is due from him.

IF a perſon ſtrike another upon the mouth, ſo as to looſen his teeth, a delay of a year muſt be obſerved, (as mentioned above,) in order to aſcertain the effect. If, therefore, the *Kázee* appoint a year's delay, and the perſon who was ſtruck appear before him without his teeth, previous to the expiration of the year, and the plaintiff and defendant diſagree,—the former aſſerting that his teeth fell out in conſequence of the blow he had received from him [the defendant,] and the

If they be *looſened* blow, of one y muſt be granted before paſſing judgment, latter affirming that they fell out in conſequence of a ſubſequent blow received from another,—the aſſertion of the plaintiff, upon oath, muſt be credited, in order that the advantage of fixing a term of delay may be maintained. It is otherwiſe where the parties differ after the expiration of the year; for in that caſe the oath of the ſtriker muſt be credited.

which, at the expiration of that term, muſt be paſſed according to the event.

If, in the above caſe, the year of delay appointed by the *Kázee* expire, and the teeth do not fall out, nothing whatever is due from the ſtriker. If, on the other hand, the teeth turn black, or decay, a fine for them is due,—from the *Akilas* in a caſe of miſadventure, or from the ſtriker in a *wilful* caſe:—but retaliation is not due, as equality cannot poſſibly be obſerved in the infliction of it, ſince it is not in the power of man to hit the teeth of the ſtriker ſo as to produce the ſame preciſe effect upon them;—and for the ſame reaſon, if a perſon break off part of another's tooth, and the reſt of the tooth turn black, retaliation is not to be inflicted.

There is no fine for a cut on the head which afterwards heals without leaving a ſcar;

If a perſon give another a cut upon the head, and the cut heal, and the hair grow upon the place, ſo that no mark of it remains, the fine is remitted, according to *Haneefa*, as the defect which would have occaſioned the fine no longer exiſts. *Aboo Yooſaf* holds that the ſtriker ſtill owes a fine for the pain of the wound; becauſe, notwithſtanding the mark of the injury be effaced, yet the pain has been ſuſtained, and that requires a recompence. *Mohammed*, on the other hand, maintains that the ſtriker is liable merely for the expence of the ſurgeon; for as the wounded perſon has been ſubjected, by the act of the ſtriker, only to the hire of the ſurgeon, and the price of his remedies, the caſe is therefore the ſame as if the offender had taken and deſtroyed ſo much of the wounded perſon's property. *Haneefa* ſays that the award for the pain, as mentioned above, can only be determined by conſidering for how much a perſon might undertake to bear ſuch a degree of pain, ſuppoſing it poſſible that a man were hired ſolely for the purpoſe of bearing pain. The award, therefore, for the pain is oppoſed to the trouble ſuſtained in bearing it. Now trouble is not valuable but under a contract of hire, either valid or invalid; and as no ſuch contract exiſts on the part of the offender, it follows that no value can be ſet upon the trouble of the wounded perſon in bearing the pain occaſioned by the offence; and conſequently, that the offender owes nothing on that account;—in the ſame manner as where a perſon ſtrikes another a blow with his fiſt, and puts him in pain; in which caſe nothing whatever is due; and ſo here likewiſe. With reſpect, moreover, to the fee of the ſurgeon, the wounded perſon has paid it at his own diſcretion, and therefore the offender is not liable for it.

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If a perſon give another one hundred ſtripes (for inſtance) and thereby cut him, and the perſon ſo cut recover, in this caſe a fine is due for the ſtripes, provided they leave a mark; but if they do not leave a mark, the fine is remitted. *Aboo Yooſaf* maintains that a fine is due for the pain inflicted. *Mohammed*, on the other hand, alleges that the offender muſt pay the expence of a ſurgeon. The fine for ſtripes is to be determined by obſerving the proportion which the wounds they occaſion bear to thoſe for which a fine is appointed.—If, therefore, they be in the degree of one half, an half of the appointed fine for a wound is due; if, of one third, a third of the fine is due; and ſo forth.

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If a perſon ſtrike off the hand of another by miſadventure, and then, before he has recovered, ſlay him by miſadventure, he owes a complete fine, and the fine for the hand is remitted; becauſe both offences are of one ſpecies or deſcription, namely, *by miſadventure*; and the award for both is the ſame, namely, a fine; and as the conſideration for the perſon is alſo a conſideration for all its parts, it follows that the fine for the member is included in the fine for the whole man, whence the caſe is the ſame as if he had ſlain him at the firſt.

Retaliation is not inflicted for a wound, until after the wounded perſon's recovery.

If a perſon [wilfully] wound another, retaliation muſt not be inflicted until the wounded perſon ſhall have recovered; becauſe the prophet has ſaid, "*In the caſe of wounds a delay muſt be obſerved for one year*;" and alſo, becauſe regard is paid to the *ultimate conſequence* of a wound, as the award for it is at preſent unknown, ſince it is poſſible that it may prove fatal, and conſequently that the act may prove to be murder. The award, therefore, for a wound is not fixed until it be healed.

The fine for *wilful* offences, and for offence, are to be diſcharged by the offender.

In all wilful offences, where retaliation is remitted becauſe of a doubt, a fine is due from the property of the offender; and all *compoſitions* for offence, alſo, fall upon the property of the offender;—for the prophet has ſaid, "*The* Akilas *are not to pay the fine for a wilful offence, nor the fine of a ſlave, nor a compoſition for offence, nor a fine incurred by acknowledgment, nor any thing ſhort of the fine for a* Mawziha *wound.*"—It is to be obſerved, however, that in the firſt of the above caſes (where retaliation is remitted becauſe of a doubt) the fine is payable in three years; for as the offence, in this inſtance, is analogous to manſlaughter or homicide by miſadventure, becauſe of the doubt, the ſame delay is therefore granted in the payment of the fine. In the caſe of compoſition, on the contrary, it is due upon the inſtant, being rendered obligatory by a particular contract, in the ſame manner as the price of the goods in a contract of ſale.

A father

If a father wilfully murder his ſon, a fine is due from his property, payable in three years. *Shafeï* maintains that it is payable upon the inſtant. The argument of our doctors is, that in all caſes of offence the law has granted a delay in the payment of the fine; and the precepts of the law are not to be ſet aſide, eſpecially to countenance an aggravation, which the immediate exaction of the fine would amount to.

THE fine for any offence eſtabliſhed upon the acknowledgment of the offender, is due from his property, his acknowledgment not being regarded with reſpect to his *Akilas*; becauſe of the ſaying of the prophet before quoted, and alſo becauſe the effect of an acknowledgment cannot extend beyond the acknowledger himſelf, (he having no authority over others,) and therefore does not affect his *Akilas*.

**A fine incurred in confe- [illegible] ment muſt [illegible] paid by the acknowledger.**

WILFUL murder committed by an infant, a lunatic, or a perſon occaſionally inſane, [*Matooá,*] being the ſame as homicide by miſadventure, the fine for it is due from the *Akilas*, and ſo likewiſe every other fine incurred by ſuch perſons to the amount of five hundred *dirms* and upwards. *Shafeï* ſays that wilful murder by thoſe perſons comes under the conſtruction of *wilful*, inſomuch that the fine for it is due from the property of the perpetrator; becauſe the act was wilful undoubtedly, as the term *wilful* applies to any thing done by intention and with deſign; and retaliation is remitted in this inſtance ſolely becauſe perſons of the above deſcription are not liable to any corporal infliction,—which argument, however, does not apply to their property, whence it is that expiation is required of them. The arguments of our doctors upon this point are twofold.—FIRST, it is recorded of *Alee* that he once decreed the fine incurred by a lunatic to be paid by his *Akilas*.—SECONDLY, an infant or lunatic is an object of compaſſion; and as an adult, or a ſane perſon, is entitled to an alleviation, inſomuch that his fine is paid by his *Akilas*, it follows that thoſe are likewiſe entitled to an alleviation *a fortiori*. With reſpect, moreover, to what *Shafeï* ſays, that "their act is *wilful*," it is not admitted; for will depends upon knowledge; and knowledge depends upon reaſon, which in a lunatic is altogether wanting, and in

**Wilful murder, by an infant or lunatic, requires a fine, payable by their *Akilas*.**

in an infant is defective. Neither are they (as he alleges) required to make expiation; becauſe that is performed to cover a crime; and in the preſent inſtance there is no crime to be covered, as they are held incapable of committing a crime.

## SECTION.

### *Of* EMBRYOS *in the* WOMB.

A perſon ſtriking a woman ſo as to occaſion h-- miſcar- (of a [illegible] the complete fine [a *Ghorra*,]

IF a man ſtrike a pregnant woman upon the belly, ſo as to cauſe her to miſcarry of either a male or female fœtus, begotten free, a *Ghoorá* * being a twentieth of the complete fine for a man, namely, five hundred *dirms*, is due, upon a favourable conſtruction. Analogy would ſuggeſt that nothing whatever is due from the ſtriker in this inſtance; becauſe the living exiſtence of a fœtus is not a matter of certainty; and mere probability is not an admiſſible ground of claim. The reaſon, however, for a more favourable conſtruction of the LAW in this particular is, that the prophet has ſaid, "*A* GHORRA *is due for a fœtus*;" and by a *Ghorrá* is underſtood a male or female ſlave, of the value of five hundred *dirms*.

of which his *Akilas* are to pay their part;

THE *Akilas* of the ſtriker, in the above inſtance, are to pay their part of the fine [the *Ghorrá*] according to our doctors. *Málik* maintains that it is ſolely due from the property of the ſtriker; becauſe it is paid in compenſation for a part of the body; for a fœtus is a part of the mother; and a compenſation for a part of the body, like the compenſation for a *finger* (for inſtance,) is due from the property of the offender. The arguments of our doctors are twofold.—FIRST, a precept of the prophet, who once decreed a *Ghorrá* to be paid by the *Akilas*.—SECONDLY, the *Ghorrá* is a compenſation for the perſon, (of the fœtus,) not for a part of the body;—whence it is that the prophet denominated it

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* This is a technical term, expreſſive of a fine of five hundred *dirms*,—derived from the appellation generally given in *Arabia* to an infant male or female ſlave of that value.

and it is payable within a year:

THE *Ghorrá* is payable within a year. *Shafeï* ſays that it is payable in three years; becauſe it is a compenſation for the perſon, and accordingly is diſtributed among the heirs of the fœtus. The arguments of our doctors upon this point are twofold.—FIRST, It is recorded, in the traditions, that the prophet, upon a certain occaſion, decreed a *Ghorrá* to be paid by the *Akilas* within the year.—SECONDLY, the *Ghorrá* is a compenſation for the *perſon*, conſidering the embryo as a ſeparate exiſtence; but it is alſo a compenſation for a part of the body, conſidering the embryo as connected with the mother. Now we pay attention to both conſiderations; and accordingly, we adjudge the inheritance [of the fine among the embryo's heirs] on the *firſt* conſideration, and on the ſecond conſideration adjudge the term of one year for the payment,—the compenſation for a part of the body, where it falls ſhort of the complete fine, being invariably payable within a year. It is otherwiſe with reſpect to parts or diviſions of the fine; for any part thereof due from any perſon is payable in three years *.

but *if*

IF a perſon ſtrike a woman upon the belly, and ſhe in conſequence bring forth a living child which afterwards dies, a complete which afterwards dies, he owes a complete fine.

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* The *Ghorrá* is not conſidered merely as a *proportion of the fine*, but is a diſtinct and ſeparate ſpecies of fine, impoſed ſolely in the caſe of *embryos*.

fine is due from the ſtriker, as he, by ſtriking the mother, has produced the deſtruction of a living perſon.

If the woman ſo ſtruck miſcarry of a dead fœtus, and alſo die herſelf, the ſtriker is accountable both for a complete fine, and a *Ghorrá*.

If a perſon ſtrike a woman on the belly, and ſhe in conſequence miſcarry of a dead fœtus, and afterwards die, the ſtriker owes a fine for the murder of the mother, and a *Ghorrá* on account of the miſcarriage,—the prophet having ſo decreed in ſuch an inſtance.—If, on the contrary, the mother firſt die of the blow, producing a living child which afterwards dies likewiſe, the ſtriker owes one fine on account of the mother, and another on account of the child, as having here murdered two people. If, on the other hand, the mother die of the blow, producing a dead child, a fine is due for the mother, but nothing whatever for the child. *Shafeï* maintains that in this caſe a *Ghorrá* is due on account of the dead child; for as the death of the child has been, to all appearance, occaſioned by the blow, the caſe is therefore the ſame as if the mother had produced a dead child whilſt ſhe was yet alive. The argument of our doctors is, that it may have been the death of the mother which produced that of the child, as an embryo muſt neceſſarily periſh where the mother dies, ſince the life of the one is derived from that of the other:—hence it is doubtful whether the death of the child was occaſioned by that of the mother, or by the blow; and there is no reſponſibility in any caſe of doubt.

The ſtriker cannot inherit any part of the *Ghorrá*.

The fine or penalty incurred on account of an embryo goes as an inheritance to the embryo's heirs, as being a compenſation for his perſon. The ſtriker *, however, cannot have any ſhare in ſuch inheritance. If, therefore, a man ſtrike his wife on the belly, ſo as to cauſe her to miſcarry of a dead child, of his begetting, his [the father's] *Akilas* are reſponſible for a *Ghorrá*, of which he cannot inherit any part; becauſe he has ſlain the child unrightfully, and is therefore guilty of murder; and there is no inheritance for a murderer.

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* Meaning, the perſon who ſtruck the mother, and thereby occaſioned the miſcarriage.

Caſes of miſcarriage oc caſioned wi

IF a perſon ſtrike upon the belly a pregnant female ſlave, whoſe pregnancy has proceeded from ſome other than her maſter, and ſhe, in conſequence, miſcarry of a dead fœtus, but herſelf remain alive, the value of the fœtus muſt in this caſe be eſtimated at the ſame rate as if it were alive. If, therefore, it be a male fœtus, a twentieth of the value is due; or, if a female, a tenth. *Shafeï* maintains that the ſtriker is liable for a tenth of the value of the mother; becauſe, as the embryo is, in one view, a part of the mother, the rate of compenſation is therefore determined by the value of the mother, who is the original,—the rate of reſponſibility for a part being always determined by the rate of the original. The argument of our doctors is that a *Ghorrá* is a compenſation for the perſon, not for a part or member of the body;—for a compenſation for a part or member is not due unleſs ſome noticeable defect be occaſioned in the original; (inſomuch that if there be no defect occaſioned in the original, nothing whatever is due;—as where, for inſtance, a perſon ſtrikes out the tooth of another, and a ſecond tooth grows in its place,—in which caſe the ſtriker is not liable for any thing;)—and in the caſe in queſtion the defect occaſioned in the original (namely, the mother) is of no account, ſince a reſponſibility attaches for the embryo whether a defect have been occaſioned in the mother or not. As, therefore, the *Ghorrá* is evidently a conſideration for the perſon, and not for any part or member, the rate of it is to be determined by the conſideration for the perſon. Now, in eſtimating the conſideration for the *perſon*, the original thing is the *perſon of a freeman*; and the rate for the perſon of a free-begotten embryo, if it be a male, is a twentieth of the fine for a man, or, if a female, the tenth of the fine for a woman;—whence the ſame rule holds with reſpect to the embryo produced from a female ſlave. As, however, the *value*, in the caſe of a ſlave, is a ſubſtitute for the *fine*, in the caſe of a freeman, the ſtriker therefore owes a twentieth of the value of the embryo, if it

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be a male, or the tenth if it be a female. *Aboo Yooſaf* maintains that the ſtriker is reſponſible for any damage which the mother may have ſuſtained, in the ſame manner as holds in the caſe of animals,—the reſponſibility for a ſlave being (according to his tenets) a reſponſibility for property, as ſhall be preſently explained.

If a perſon ſtrike a pregnant female ſlave upon the belly, and her maſter afterwards emancipate "whatever may be in her womb," and ſhe then miſcarry of a living child, which ſhortly after dies, the value of it, as a living child, is due, and not the *fine*, notwithſtanding it died after manumiſſion; for the offender is accounted to have killed the child by a blow given to the mother at a time when it was ſtill a ſlave.

Expiation is not required for the deſtruction of an embryo.

Expiation is not due for an offence committed upon an embryo. *Shafeï* maintains that expiation is due in this inſtance; for an embryo is, in one view, a perſonal entity[*]; and as, in the caſe of a perſonal entity, life is moſt probable, an expiation muſt therefore be performed, out of caution. The argument of our doctors is that expiation is a ſort of penal infliction, as it has been ordained for the purpoſe of determent. Now determent applies ſolely to the *perfect man*[†], not to any other ſubject; and an embryo is not a *perfect man*, for if it were ſo, a complete fine would be due. Our doctors, however, remark that if the ſtriker be deſirous of performing expiation, it is lawful; for as he has been guilty of a prohibited act, it is conſequently moſt laudable that he perform expiation and intreat forgiveneſs. It is to be obſerved that a fœtus not yet perfectly formed is the ſame as a perfect embryo with reſpect to all the rules concerning embryos;—becauſe the ſaying of the prophet, before quoted upon this ſubject, is unreſtrictively expreſſed; and alſo becauſe, as an imperfect fœtus is the ſame as a born child, with reſpect to conſtituting a female ſlave *Am-Walid*, the termination of *Edit*, and ſo forth, it is conſequently the ſame with reſpect to the law in queſtion. Beſides, from the inſtant of the firſt formation of the *fœtus* it becomes diſtinguiſhed from the body of the mother, and is therefore a diſtinct perſon.

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[*] Arab. *Zát*.—Literally, a *ſelf*; meaning, a diſtinct and ſeparate being. The *Engliſh* language does not afford any term preciſely correſponding with it.—(For a further explanation of it, ſee the preceding book, p.

[†] Arab. *Zát Kàmil*; literally, a *perfect*

## CHAP. II.

## Of Nuiſances placed in the Highway.

Buildings or timbers placed *in* or projecting *over* the highway may be removed by any perſon whatever.

If any perſon conſtruct a bath, or ſet out a water-ſpout, or erect a wall, or ſet out timbers from his wall to build upon, or ſet up a ſhop or booth,—in the public road, every other perſon is at liberty, however mean and humble his condition, to pull down the ſame, and remove it; becauſe all people are entitled to a free paſſage along ſuch a road for themſelves and their cattle; and the caſe is therefore the ſame as where a ſtranger erects a building upon a partnerſhip property; in which inſtance any one of the partners is at liberty to remove ſuch building; and ſo here likewiſe the removal is lawful to all, as all are alike partners in the rights of the road. It is lawful, however, for the perſon in queſtion, in all the above caſes, to make uſe of the bath, fountain, or ſo forth, where they are no way injurious to the community; for as he has the right (in common with others) of paſſing and repaſſing, it follows that, provided there be no injury ſuſtained the obſtructing him in the enjoyment would be vexati if they be injurious to the community, the uſe of them is minable.

They cannot be erected or ſet up in a cloſed lane without the of the inhabitants.

It is not lawful for an inhabitant of a lane ſhut up at one end to conſtruct in it a bath, ſet out a ſpout, or ſo forth, without the conſent of the other inhabitants, whether it be injurious to them or otherwiſe; for as the lane is, in fact, their property, (whence it is that the right of *Shaffa* with reſpect to the houſes in it appertains equally to them all,) their acquieſcence is therefore indiſpenſable. In a public road, moreover, the converſion to particular uſe is lawful to all men indiſcriminately, excepting only in inſtances where it may prove detrimental; for as it is impoſſible to obtain the acquieſcence of every individual of the community, each is therefore accounted a proprietor, leſt his right of uſe ſhould be altogether defeated:—but it is not ſo in a cloſed lane; for as it is practicable to obtain the acquieſcence of all the inhabitants of the lane, the privileges of partnerſhip therefore hold good, both actually and virtually, with reſpect to each individual of them.

A perſon erecting a building, &c. in the highway incurs a fine for any perſon

If a perſon erect a building in the public highway, as before mentioned, and it happen to fall upon and deſtroy any one, a fine is from the *Akilas* of the perſon in queſtion; becauſe he was the occaſion of the deſtruction, and was guilty of a tranſgreſſion in having erected a building in ſuch a ſituation; and a perſon who occaſions a deſtruction is reſponſible where he has in any reſpect tranſgreſſed, as in the caſe of digging a well in the highroad. The ſame rule alſo obtains where the building falls upon and thus deſtroys a man or an animal.

[illegible] of

If a man ſtumble over the ruins of ſuch building, and fall upon another man, and they both die, the perſon who erected it is reſponſible

ſible for both, and nothing is due from him who fell upon the other; for as the builder was the primary cauſe of the accident, the caſe is therefore the ſame as if he had ſtruck the perſon who fell, and ſo cauſed him to fall upon the other, and they had both died in conſequence.

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tion of.

If a water-ſpout, ſet out from a houſe over the public road, fall upon any perſon, and kill him, an examination muſt be made to diſcover which part of the ſpout it was that hit the perſon; and if it appear that he was ſtruck by the end next the houſe from which it had projected, no atonement is due from the perſon who ſet it up, becauſe with reſpect to that part he is not a tranſgreſſor, ſince he had placed *that* in his own property; but if it appear that the deceaſed was ſtruck by the projecting end, the perſon who ſet it up is reſponſible, becauſe with reſpect to that part he is a tranſgreſſor, as having cauſed the ſpout to project over the road without any neceſſity, ſince he might to as good purpoſe have fixed it up ſo as not to project over the road at all.—(It is to be obſerved that in this inſtance expiation is not incumbent on the fixer up of the ſpout;—nor is he excluded from inheritance; for he is not the actual perpetrator, but ſtands merely guilty of *homicide by an intermediate cauſe.*)—If, on the other hand, it appear that the deceaſed was ſtruck by both ends of the ſpout, the fixer-up is reſponſible for an half of the fine, and the other half drops; in the ſame manner as where a perſon is wounded by another, and alſo by a lion or tiger, and dies,—in which caſe an *half* only of the fine is due from the wounder. If it cannot be diſcovered which part of the ſpout ſtruck the deceaſed, in this caſe alſo an half of the fine is due; for the accident may have happened in either of *two* ways, in one of which the complete fine is due, and in the other nothing whatever; and therefore, in contemplation of *both* circumſtances, an *half* is impoſed.

Caſe of

upon his houſe. is re- for damage ay occa- ſion even af- ter he has ſold the houſe.

If a perſon conſtruct a balcony, projecting from his houſe, and then ſell the houſe, and the balcony afterwards fall upon any perſon and deſtroy him,—or, if a perſon ſet up a piece of timber in the middle of the highway, and afterwards ſell it, and deliver it to the purchaſer, and he [the purchaser] declare him acquitted of all accidents which may happen from it, and leave it there until it fall and kill ſome perſon,—the ſeller is reſponſible in both inſtances, and nothing whatever falls upon the purchaſer; becauſe the act of the ſeller (in conſtructing the balcony, or ſetting up the timber) is not done away by the extinction of his property; and as ſuch act occaſions reſponſibility, he is reſponſible accordingly, and not the purchaſer, who has not done any act to occaſion reſponſibility.

is reſponſible for any thing which may be burnt in

a perſon lay fire in the highway, and any thing be burnt in conſequence, he, as having tranſgreſſed, is reſponſible for the damage. If, however, after the fire being thus laid in the highway, the wind ſhould blow it to another place, and any thing be burnt in conſequence, he is not reſponſible, as by the wind carrying off the fire his act is done away. Some, indeed, ſay that if the fire was laid in the highway at a time when the wind was high, he is reſponſible; becauſe he laid the fire there, notwithſtanding his knowledge of the probable conſequence; and therefore the act of the wind, in carrying it off, is in effect the ſame as if he had himſelf carried it to the place which was burnt.

conſtructing a nuiſance

accident it may occaſion before their

If a perſon hire workmen for the purpoſe of conſtructing a balcony, or a penthouſe, and ſuch balcony or penthouſe fall upon and a man before the workmen had finiſhed it, the reſponſibility falls entirely upon the workmen; for the deceaſed was deſtroyed in conſequence of their act; and ſo long as they continue engaged in the work, the balcony or penthouſe is not held to be delivered to their employer. Their act is therefore conſtrued into homicide, inſomuch that they muſt perform an expiation for it. Beſides, as their employer did not hire them to *kill* any perſon, but to conſtruct an erection, the accident has therefore no relation to the contract of hire, but attaches to the workmen alone, whence the damage alſo attaches ſolely to them, as being a conſequence of their act. If, on the contrary, the balcony or penthouſe in queſtion fall after the work is finiſhed, the owner of the houſe is reſponſible, on a favourable conſtruction; for in this caſe the contract of hire has been completely fulfilled, inſomuch that the workmen have become entitled to their wages. Their act has therefore devolved upon their employer, who conſequently ſtands in the ſame predicament as if he had himſelf performed the work; and he is reſponſible accordingly.

IF a perſon ſpill water on the highway, either purpoſely, or by performing his ablutions there, and a man or animal periſh in conſequence, a fine for the man is due from the perſon's *Akilas*, or a compenſation for the animal from the perſon himſelf; becauſe he has been guilty of a tranſgreſſion, injurious in its conſequences to the paſſengers upon the road. It is otherwiſe where water is ſpilled in a cloſed lane by one of the inhabitants, and a man or animal periſhes in conſequence; or, where an inhabitant of ſuch a lane ſets down any thing in the middle of it, and a man or animal falls over the ſame, and ſo periſhes; for in none of theſe caſes does reſponſibility attach to him, as any inhabitant of a cloſed lane is entitled, in virtue of his reſidence, to perform theſe acts in ſuch lane, in the ſame manner as in a partnerſhip houſe. Lawyers remark that what is here advanced applies only to a caſe where water is ſpilled upon the road in large quantities, ſuch as commonly renders the footing inſecure;—but that if the water be only in a ſmall quantity, and not in a degree to endanger the paſſenger, there is no reſponſibility.

reſponſible for any accident occaſioned by his throwing water in the highway,

IF a perſon knowingly and wilfully paſs over a road in which water has been ſpilled, as above, and periſh in conſequence of falling

unleſs the perſon who

ge had aff- ſuch water.

in it, nothing whatever is incurred by the perſon who ſpilt the water, ſince here the deceaſed has periſhed from his own wilfulneſs or obſtinacy. Some, however, remark that this rule obtains only where the water is ſpilled over a *part* of the road, for in that caſe a part remains unaffected by it;—whereas, if it extend over the whole road, the paſſengers have no option; and (as they further obſerve) the ſame diſtinction holds with reſpect to *timbers*, or other nuiſances, ſet up in the highway.

The perſon who directs water to be ſprinkled in the road is reſponſible for accidents.

If a ſhopkeeper deſire a perſon to ſprinkle water in the front of his ſhop, and another perſon fall there, and die in conſequence, the reſponſibility reſts upon him who gave the order, [the ſhopkeeper,] on a favourable conſtruction;—(and ſo likewiſe, if a ſhopkeeper hire a workman to erect a ſtall or other edifice in the front of his ſhop, and after it is finiſhed a perſon fall over it and die;)—becauſe the order given by the ſhopkeeper is of a lawful nature, his right to the precincts in front of his ſhop being ſuperior to that of any other perſon; and therefore the act of the perſon whom he directed muſt be referred to himſelf.—It is otherwiſe where a perſon orders another to throw water, or erect an edifice, in the middle of the highway; for in this caſe the reſponſibility reſts upon him who obeyed the order, as an order to this effect is unlawful, the man who gave the order poſſeſſing no ſuperior right in the highway.

Caſe of a perſon digging a well, or laying a ſtone, in the highway.

If a perſon dig a well, or lay a ſtone, in the middle of the highway, and a man periſh in conſequence, a fine is due from the *Akilas* of the perſon who placed ſuch nuiſance there. If, on the contrary, an animal were thus to periſh, the compenſation for the ſame would be due from the *property* of the perſon in queſtion; becauſe, as he has been guilty of a tranſgreſſion, he is therefore reſponſible for any accidents it may occaſion; and as the *Akilas* are not implicated except in offences againſt the *perſon*, it follows that, in caſes of *property* merely, the reſponſibility reſts ſolely upon the offender himſelf.

THE throwing of dirt or earth in the highway, or the carrying away of earth thence, ſo as to occaſion an hollow, is the ſame as placing there a ſtone or log of wood, for the reaſons already explained. It is otherwiſe where a perſon merely *ſweeps* the road; for in this caſe he is no way liable to reſponſibility, as his act of ſweeping does not occaſion any nuiſance, but rather the contrary. If, however, this perſon leave an heap of the ſweepings in the road, ſo as to occaſion accidents, he is reſponſible, ſince in acting thus he is guilty of a tranſgreſſion.

The t ing dirt, or digging a hole, in the highway is the ſame as placing a ſtone there.

IF a perſon lay a ſtone in the highway, and a ſecond perſon remove the ſtone to another part of the road, and a man be thereby deſtroyed, the reſponſibility reſts upon the remover of the ſtone; becauſe the act of the original depoſitor is abrogated in its effect, by the place which he had occupied with the ſtone being cleared, and another place being occupied with it by the act of the remover,—who is therefore reſponſible for the conſequence.

The remover of a nuiſance to another ſpot incurs reſponſibility for any accident it may afterwards occaſion.

IT is related in the *Jama Sagheer*, that if a perſon conſtruct a common ſewer in the public highway, by the order or compulſion of the Sultan, he is not reſponſible for conſequences; becauſe, in conſtructing the ſewer, he has not committed any tranſgreſſion, for in ſo doing he acted by order of the Sultan, who poſſeſſes a paramount authority with reſpect to all public rights. It is otherwiſe where a perſon does ſo without ſuch an order; for in that caſe he is reſponſible, as having tranſgreſſed, in preſuming to encroach upon the public rights without a ſufficient authority:—beſides, acts with reſpect to the highway are permitted under a condition of ſafety,—that is, under the condition that they be not injurious. It is to be obſerved that

There is no

this diſtinction holds in all caſes of acts with reſpect to the highway, as the ſame reaſoning equally applies to every other inſtance.

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ſion.

If a perſon dig a well in his own land, and another be killed by falling into it, the digger of the well is not reſponſible, as he has not tranſgreſſed; and the ſame rule alſo holds where a perſon digs a well within the precincts of his houſe, a man being entitled ſo to do, for the purpoſes of domeſtic convenience. Some ſay that this rule with reſpect to a well dug in the precincts of a houſe holds only in caſes where the houſeholder has either a property in ſuch precincts, or poſſeſſes a right, by immunity, of digging therein;—but that where the precinct is public, or held in partnerſhip, (as in the caſe of a court or cloſed lane,) the digger is reſponſible, ſince in digging the well under ſuch circumſtances he is guilty of a tranſgreſſion.—This is approved.

**A perſon falling into a well, and there dying of *hunger*, does not occaſion reſponſibility.**

If a perſon dig a well or pit in the highway, and another happen to fall in, and there periſh of hunger, the digger is not reſponſible, according to *Haneefa*, becauſe the deceaſed has here died of *hunger*, and not in conſequence of the excavation, as his death cannot be attributed to the latter unleſs he be killed by the fall, which is not the caſe in this inſtance.

**Workmen employed to**

**ſponſible for accidents un-**
**they be**
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If a perſon hire workmen to dig a well in the precincts of his neighbour's habitation, and they dig it accordingly, and a man be killed by falling into it, the reſponſibility reſts upon the employer, not upon the workmen, provided they dug the well under the idea of the place being within the precincts of their employer; becauſe, as a contract of hire, ignorantly engaged in, is lawful and valid in appearance, their act is therefore referred to the hirer, they themſelves having proceeded under a deception:—the caſe being, in fact, the ſame as where a perſon deſires another to ſlay "ſuch a goat," and

be

he does ſo accordingly, and it afterwards appears that the goat was the property of another,—in which caſe the compenſation is paid by the perſon who gave the order. It is otherwiſe where the workmen dig the well, knowing, at the ſame time, that the place is not within the precincts of their employer; for in this caſe they are reſponſible; becauſe the contract is not here valid in appearance, as they have not been deceived.

The builder of a private b[illegible] n[illegible] ſi[illegible], life which may be loſt in paſſing over it.

IF a perſon conſtruct a bridge, or lay a plank, in the highway [over a ſtream] without authority, and another, wilfully paſſing over ſuch bridge or plank, fall off and periſh, ſtill the perſon in queſtion is not reſponſible; becauſe although he be the creator of the cauſe, and therefore a tranſgreſſor, yet as the deceaſed was a wilful agent [*], and tranſgreſſed in his own act [†], his deſtruction is therefore referred to himſelf; and alſo, becauſe where the act of one who has an option intervenes, it precludes the reference of the deſtruction to the firſt agent; as where (for inſtance) a perſon digs a well in the highway, and another gives a man a puſh, and thereby cauſes him to fall into the well, ſo that he dies,—in which caſe the reſponſibility reſts upon the perſon who gave the puſh, ſince his act, being the act of a wilful agent, precludes a reference of the deſtruction to the digger of the well.

A porter is reſponſible for accidents occaſioned by his load.

IF a perſon be carrying a load upon the highway, and the load fall upon any perſon ſo as to kill him, or fall in the road ſo as to cauſe a perſon to ſtumble and thereby occaſion his death, the reſponſibility reſts upon the carrier;—whereas, if a perſon be wearing a cloak upon the highway, and it fall upon any perſon, or upon the road, ſo as to occaſion death, the carrier of the cloak is not reſponſible.

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[*] Arab. *Mobáſhir*;—literally a perpetrator.

[†] (Probably) as having paſſed over the bridge, &c. without leave from the builder of it.

The difference between theſe two caſes is, that as the buſineſs of the carrier is to take care of his parcel or load, the circumſtance of reſtricting his liberty of carrying it to the condition of ſafety does not operate as a hardſhip upon him;—whereas, the buſineſs of the wearer is not merely the taking care of his garment, but the *wearing* of it; and therefore, as the reſtricting his liberty of uſe to the condition of *ſafety* would operate as a hardſhip, his uſe of it is not reſtricted to any particular conditions, but is allowed to him generally.

**A ſtranger hanging up a lamp, or ſtrewing gravel, &c. in a moſque, is reſponſible for any accidents**

If a perſon hang up a lamp, or ſpread a carpet, or ſtrew gravel in a moſque appropriated to any particular tribe or people, and any perſon periſh in conſequence, nothing is incurred, provided the perſon who hung up the lamp, or ſo forth, be one of that people;—whereas, if a ſtranger do any of theſe acts, he is reſponſible. In the ſame manner, if one of the people of a moſque ſit in that moſque, and any perſon periſh in conſequence, he is not reſponſible, provided he be, at the time, engaged in prayer: but if he be engaged in reading the Koran, or teaching, or be waiting for the time of prayer, or ſleeping (either during prayer or at any other time,) or converſing, he is reſponſible. The reaſon for the law in the former inſtance is, that as all the regulations of a moſque, ſuch as the appointment of a prieſt or a ſupervisor, the opening and ſhutting of the doors, and ſo forth, appertain ſolely to the people to whom the moſque belongs, and not to any others, their acts are therefore of a neutral nature, and are not reſtricted to the condition of ſafety; whereas the acts of all others with reſpect to it are either tranſgreſſive, or permitted under the condition of ſafety; and a pious intention does not prevent reſponſibility where the perſon errs in the *manner* of his piety. The reaſon for the law in the ſecond inſtance is, that a moſque is conſtructed particularly for the purpoſe of prayer, to which reading the Koran, teaching, or ſo forth, are only (as it were) appendages; and as it is indiſpenſable that a diſtinction be made between the original and the branch, or dependant, the act of prayer (which is the original) is therefore permitted generally, without any reſtriction to the condition of ſafety, whereas all other acts or employments are ſo reſtricted.

IF a ſtranger to the people of the moſque be at prayers in it, and a perſon fall over him, and die in conſequence, the ſtranger is no way reſponſible; becauſe (as has been already obſerved) a moſque is conſtructed for the purpoſe of prayer; and although the right of public prayer appertain ſolely to the people of that moſque, yet any perſon is entitled to pray there alone.

but he is not reſponſible for accidents occaſioned by his own perſon.

## SECTION.

### *Of Buildings which are in danger of falling.*

IF a wall belonging to any perſon lean towards the public highway, and a perſon require the owner to pull it down, and call people to witneſs his requiſition, and the owner neglect taking it down, until at length it fall and deſtroy either man or property, the owner is reſponſible for the damage ſo occaſioned, on a favourable conſtruction. Analogy would ſuggeſt that he is not reſponſible; (and ſuch is the doctrine of *Shafeï*;) for he has neither perpetrated the deſtruction himſelf, nor done any thing tranſgreſſively to occaſion it, as he built the wall in his own right, and its tottering, or the wind ſhaking it, were not his acts, whence the caſe is the ſame in effect as if the wall had fallen previous to the requiſition, and calling of witneſſes, as aforeſaid. The reaſons, however, for a more favourable conſtruction of the LAW in this particular are twofold.—FIRST, upon a wall leaning over

The owner of a ruinous wall is reſponſible any acci[illegible] occaſioned by it after having received due warning, and requiſition to pull it down.

over towards the highway, the public communication becomes interrupted, and the way* occupied by the property of the owner of that wall. When, therefore, any perſon makes application to him, and requires him to clear the way, it is incumbent on him ſo to do; and he is conſequently guilty of a tranſgreſſion in neglecting it, and therefore remains reſponſible for any damage it may occaſion;—in the ſame manner as where a man finds his garment upon another, and demands it of him; in which caſe, if that other refuſe to deliver it, he is guilty of a tranſgreſſion, and is conſequently reſponſible for the garment if it ſhould be loſt whilſt in his poſſeſſion.—SECONDLY, if the owner of the wall were not made reſponſible for any damage its falling might occaſion, he would neglect to remove the nuiſance, and conſequently paſſengers would ſuſtain an injury, as they would be deterred from going by the place, for fear of the wall falling on them. The removal, moreover, of any thing injurious to the community is a duty incumbent upon the perſon to whom it belongs; and as the owner of the wall is the perſon immediately concerned in the preſent inſtance, it is therefore incumbent on him to take it down, notwithſtanding his ſo doing may be prejudicial to himſelf, ſince private intereſt muſt yield to public benefit. It is requiſite, however, that ſuch a time be allowed as may admit of the owner taking down his wall, this being indiſpenſable to the eſtabliſhment of offence from neglect or delay. If (after the requiſition for pulling it down) any perſon be deſtroyed by the wall falling, a fine is due from the *Akilas* of the owner, not from the owner himſelf; for as the offence, in this inſtance, is ſtill ſhort of *homicide by miſadventure*, an alleviation is admitted *a fortiori*, leſt the owner ſhould ſuffer too ſeverely:—but if, on the contrary, *property* (ſuch as an animal, or houſehold goods) be deſtroyed, the compenſation for it muſt be paid by the owner of the wall, as the are not implicated in the reſponſibility for property. It is to be obſerved that the *application* [that is, the requiſition for pulling down the wall] is a condition of reſponſibility, but not the *taking to witneſs*; for the latter is called in aid merely with a view to eſtabliſh the former, in caſe of the owner of the wall denying it, and is therefore uſed only out of caution. The *application* is made by the claimant ſaying to the owner of the wall, "Your wall has become dangerous;—you muſt therefore take it down, leſt it prove deſtructive;" and the *taking to witneſs* is effected by his ſaying to the byſtanders, "be ye witneſs that I have required this perſon to take down his "wall."—It is proper, however, to remark that the taking to witneſs before a wall has become ruinous or crooked is not valid, as tranſgreſſion cannot be eſtabliſhed previous thereto.

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* Arab. *Hawá*; literally, the *air*, or *atmoſphere*; a phraſe generally uſed where the nuiſance or obſtruction is not immediately upon the ground.

IF a perſon build a wall in the highway, leaning over from the firſt, lawyers remark that he is reſponſible for any thing which may be deſtroyed by its falling, independant of the requiſition before mentioned, as having been guilty of a tranſgreſſion in the building of it, in the ſame manner as a perſon who conſtructs a balcony or gallery projecting over the highway.

A perſon building a
reſponſible for the da-
falling

THE evidence of one man and two women ſuffices to eſtabliſh the application above deſcribed; for it is not here requiſite, as in caſes of murder, that both the witneſſes be males, the death occaſioned by the falling of a wall not amounting to murder.

The requiſition is eſtabliſhed upon the evidence of one man and two wo-

A MUSSULMAN and a *Zimmee* are upon an equal footing with reſpect to the requiſition for pulling down the wall, as all mankind are partners in the right of paſſing along. The application is therefore valid, by whomſoever it be made,—whether a man, a woman, a freeman, a *Mokâtib*, a ſlave, (provided his maſter give him permiſſion to litigate the point,) or an infant, (with permiſſion to litigate from his guardian.)—It is alſo valid whether made by the Sultan or any other;

A
may make it, as well as a

for as the application affects a matter of right in which all are equally concerned, all are therefore equally entitled to make it.

or the inhabitants of a neighbouring houſe;

If a wall lean over towards a neighbouring houſe, the owner of the houſe is entitled to require it to be pulled down,—or the tenants, whether they be hirers or borrowers,—for to ſuch perſons in particular the right appertains in this inſtance.

and if thoſe laſt grant a term of delay, it is valid.

If the owner or tenants of the houſe grant the owner of the wall a term of delay, or exempt him from reſponſibility for any damage which may be occaſioned by it, it is lawful, and the owner of the wall is not reſponſible in caſe of any thing being deſtroyed by its fall, becauſe the right of the owner or tenant alone is concerned. It is otherwiſe where a wall leans over a road, and the magiſtrate, or the perſon who made the requiſition for pulling it down, grants a term of delay, or an exemption; for this is not valid; and the owner of the wall conſequently ſtill remains reſponſible in caſe of its falling and deſtroying any thing; becauſe here the right of every one is concerned; and the magiſtrate, or the perſon who made the requiſition, is not at liberty to annul a right of the public.

A perſon ſelling a ruinous houſe, after requiſition, is not reſponfor any

If, after application, a perſon ſell a houſe, the wall of which leans over, and the purchaſer take poſſeſſion of it, and any thing be then deſtroyed by its falling, there is no reſponſibility whatever upon either party.—The *ſeller* is not reſponſible, as offence cannot be eſtabliſhed in him unleſs it appeared that he neglected to take down the wall, having at the ſame time ability ſo to do; and here his ability has terminated with the ſale:—neither is the *purchaſer* reſponſible, becauſe no application has been made to him. But if application be made to the purchaſer after the ſale, he then becomes reſponſible, as in that caſe he poſſeſſes the ability of complying with the requiſition.

THE application and requiſition for pulling down a ruinous wall are valid when made to any one who poſſeſſes the power of pulling it down;—but not when made to one who is not poſſeſſed of this power, ſuch as a pawnee, a truſtee, a borrower, or a renter. The application and requiſition in queſtion are therefore valid when made to the pawner of a houſe, as he has it in his power to pull down the wall by redeeming his houſe. They are alſo valid with reſpect to a wall belonging to an infant when made to the infant's parents or guardians; and if, after the requiſition, they neglect to pull down the wall, and any thing be deſtroyed by the fall of it, the compenſation falls upon the infant's property, becauſe their act is, in effect, the act of the infant. They are likewiſe valid with reſpect to a *Mokatib*, as he may be authorized to pull down a wall; and alſo, with reſpect to a trading ſlave, whether indebted or otherwiſe, for the ſame reaſon;—and if, in this laſt inſtance, the ſlave neglect to pull down the wall, and any property be deſtroyed by the wall falling, the compenſation for it reſts upon the ſlave's perſon [*];—or, if a *man* be deſtroyed, the fine is due from the maſter's *Akilas*.

The requiſition (to be *valid*) muſt be made to a perſon capable of complying it.

IF a ruinous wall be held in coparcenary by ſeveral heirs, and a perſon apply to one of the heirs, requiring him to pull down the wall, the application affects that heir in particular; and accordingly, if any thing be afterwards deſtroyed by the falling of the wall, the heir who was applied to is reſponſible in proportion to his ſhare of inheritance; for it was in his power to have remedied the nuiſance by referring the matter to the *Kázee*, and repreſenting the circumſtance to him, requiring his order to his coparceners (if preſent) to pull down the wall,—or (if abſent) his authority to do ſo himſelf.

The [illegible] tion, made to one of ſeveral co[illegible] aff[illegible] coparcener in particular.

IF a ruinous wall fall upon a man, after application, and deſtroy

After [illegible] falls, it is the

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[*] That is, he muſt either be made over or redeemed, as in other caſes of offence.

duty of the
to re-
the
and
failing of this,
he is reſpon-
ſible for ſub-
-

him, and another perſon fall over the corpſe, and ſo periſh, the proprietor of the wall incurs nothing for this ſecond perſon, becauſe the removal of the corpſe was incumbent upon the *heirs*, not upon *him*. If, on the contrary, another perſon, after the wall falling, be deſtroyed by ſtumbling over a fragment of the ruins, the owner of the wall is reſponſible, as it is his buſineſs to clear the road of all ſuch fragments, ſince thoſe are his property, and an application with reſpect to the wall itſelf is (as it were) an application with reſpect to the fragments, the intention of it being *to clear the highway*.

**The owner of a ruinous wall is not reſponſible for accidents occaſioned by the fall of any article from it, unleſs ſuch article belong to him.**

If a perſon make application concerning a wall which leans over towards the highway, and it afterwards fall, throwing down a vaſe, or urn, which had ſtood upon it, and a man be thereby deſtroyed, the owner of the wall is reſponſible, provided the vaſe or urn was his property, as the freeing the road from it reſted upon him. If, on the contrary, the vaſe or urn be the property of ſome other, the owner of the wall is not reſponſible, ſince the freeing the road from the vaſe or urn reſts upon him to whom it belongs.

CHAP.

# CHAP. III.

## Of Offences committed *by* or *upon* Animals.

The rider of
for any
mage o
ſioned by it,
which it was
in his power
to prevent;

THE rider of an animal is anſwerable for any thing which the animal may deſtroy by treading it down, or by ſtriking it with his head, his forefeet, or his body: but he is not reſponſible for any thing which the animal may deſtroy by ſtriking it with his hind-feet or his tail.—In ſhort, it is a rule that the right of paſſing on the highway is allowed to the whole community, under the condition only *of ſafety*; for it is the exerciſe of a privilege in the paſſenger, with reſpect to *himſelf* in one ſhape, and with reſpect to *others* in another ſhape, the right of paſſage being participated among the whole community,—whence it is adjudged to all, under the condition of ſafety, with a view to the intereſt of both parties.—It is moreover to be obſerved, that a reſtriction to the condition of ſafety can obtain only in matters where an attention to ſafety is practicable; for if it were impoſed where ſuch attention is impracticable, the exertion of the privilege [of travelling on animals] would be altogether precluded. Now it is poſſible for a man to guard againſt the animal he rides treading men or property under foot, and ſuch like, ſince a perſon who rides is under no neceſſity of treading down every thing that lies in his way: but he cannot guard againſt the animal ſtriking things with his hind-feet or tail, ſince an animal unavoidably uſes theſe parts, in travelling, without any immediate controul from its rider. Accordingly, he is reſtricted to the condition of ſafety in the former inſtance, but not in the latter. If, however, he ſtop the animal in the highway, he is reſponſible for any deſtruction which may be occaſioned by a kick of

and if he ſtop

its

is reſponſible for *all* accidents.

its hind-feet, or a ſtroke of its tail, ſince it is poſſible for him to avoid ſtopping, although it be not in his power to guard the animal from kicking, or ſo forth; and therefore, as he tranſgreſſes in ſo ſtopping, he is reſponſible for any damage which may enſue in conſequence.

He is alſo reſponſible for any injury [illegible] ſtone, thrown up by the animal's hoof:

If an animal's hoof ſtrike upon and throw up gravel or ſmall ſtones, and a perſon's eye be put out, or his clothes damaged thereby, the rider is not reſponſible; whereas, if the animal ſo throw up a *large* ſtone, he is reſponſible. The reaſon of this is that in the former caſe it was impoſſible to guard againſt the accident, ſince an animal cannot move without being liable to it; whereas, in the ſecond inſtance, it is poſſible to guard againſt the accident, ſince animals may eaſily be ſo guided as to avoid large ſtones. It is to be obſerved that, in all theſe caſes, a ſecond rider (that is, one who rides behind the firſt) is in the ſame predicament as the firſt, with reſpect to reſponſibility.

but not for any accident occaſioned by its dung or urine,

If an animal, whilſt travelling, diſcharge its dung or urine on the highway, and any perſon periſh in conſequence, the rider is not reſponſible, ſince it was impoſſible to guard againſt this; and the ſame rule alſo holds where the animal ſtands ſtill whilſt diſcharging its dung or urine, or when the rider ſtops it for this purpoſe, ſince there are ſeveral animals which cannot perform theſe whilſt in motion. If, however, the rider have ſtopped the animal for any other purpoſe, and it diſcharge its dung or urine, and any perſon periſh in conſequence, he [the rider] is reſponſible, as in ſo doing he was guilty of a tranſgreſſion, ſince he ſtopped the animal without any abſolute neceſſity, knowing, at the ſame time, that this muſt be injurious to the paſſengers.

unleſs he had ſtopped it on the road un- [illegible] charging thoſe.

THE driver of an animal is reſponſible for any damage the animal may occaſion with either its fore or hind-feet, whereas the *leader* of an animal is reſponſible for the damage occaſioned by its *fore*-feet only, not by its *hind*-feet. The compiler of the *Hedaya* remarks that this is what is ſaid by *Kadooree* in his compendium;—and ſeveral of our modern doctors coincide in the ſame opinion; becauſe, as a perſon who drives an animal before him has a view of his hind-feet, it is therefore in his power to avoid accidents from them; whereas, a perſon who leads an animal after him, not ſeeing or having any command over its hind-feet, cannot poſſibly guard againſt ſuch accidents. Moſt of our modern doctors, however, are of opinion that as the driver of an animal has no more command over its hind-feet than a perſon who leads it, he therefore is not reſponſible, any more than the other, for the damage which may be occaſioned by them;—and this is approved.

IT is written in the *Jama Sagheer*, that the *driver* or *leader* of an animal is reſponſible in all the inſtances in which reſponſibility lies againſt the rider; for as they (as well as one who rides) occaſion the damage by taking the animal to the place where it is committed, their ſo doing is therefore reſtricted to the condition of ſafety, as far as may be practicable, in the ſame manner as holds with reſpect to the rider.

Expiation is required from the *rider* of an animal,—not from the *leader* or *driver*.

THE rider of an animal is required to perform expiation only where he has happened to *tread down* a perſon,—not in any other inſtance;—but no expiatory act whatever is required from the *leader* or *driver* of an animal. The reaſon of this is that, in the caſe of *treading down* a perſon, the rider is, in effect, the perpetrator of the homicide, as it is by *his* weight that the perſon is deſtroyed,—the weight of the animal being merely a dependant upon the weight of its rider, ſince to him the *motion* of it muſt be referred, it being the *inſtrument* of ſuch motion. It is otherwiſe with the *leader* or *driver* of an animal; for thoſe are only the producers of the intermediate cauſe, and not the actual perpetrators of the homicide, as their acts did not immediately affect the ſubject; (and the ſame reaſoning holds with reſpect to the act of the rider in all caſes except that of *treading down*;)—and expiation is enjoined, in caſes of homicide, only where the offender is the *actual perpetrator* of the homicide, not where it is effected by an *intermediate cauſe*. In the ſame manner, the rider of an animal is excluded from his ſucceſſion to the deceaſed by bequeſt or inheritance, in a caſe of *treading down*, but not the *leader* or *driver*, excluſion from bequeſt or inheritance being reſtricted to the *actual perpetrator*.

If there be a *rider*, as well as a leader attaches to the former, not to the latter.

If one man ride upon an animal whilſt another drives or leads it along, and it tread down a man, ſome ſay that no part of the reſponſibility falls upon the driver or leader; becauſe the rider (as has been already explained) is accounted the *actual perpetrator* of the homicide, and the driver or leader the producer of the intermediate cauſe; and the accident muſt be referred to the actual perpetrator, rather than to the producer of the cauſe.—This is approved.

Caſe of two riders driving againſt and killing each other.

If two men be riding on two different animals, and ruſh with violence againſt each other, ſo that they both die, the fine for each is due from the *Akilas* of the other. *Shafeï* and *Ziffer* maintain that in this caſe the *Akilas* of each party owe an *half* fine only, on account of the other*, each having died as much in conſequence of *his own* act as of that of the *other*, whence one half of the homicide, on each part, is of no account.—The argument of our doctors is, that the death of each party muſt be referred ſolely to the act of the other, and not in any degree to *his own* act, for *his* act (namely, paſſing along the highway) is purely of a neutral nature, and an act of ſuch a nature does not admit of the death being referred to it ſo as to occaſion reſponſibility. It may indeed be objected, that upon this ground the whole of the blood is of no account, and of courſe that nothing whatever is due from the *Akilas* on either ſide;—for as the act of both (namely, paſſing along the highway) is of a neutral nature, it cannot be made the occaſion of reſponſibility. In reply, however, to this it is to be obſerved, that although the act of each party, reſpectively, be of a neutral nature, ſtill it is reſtricted to the condition of ſafety; and a neutral act, reſtricted to the condition of ſafety, notwithſtanding that it be not an occaſion of reſponſibility with reſpect to the party *himſelf*, is nevertheleſs ſo with reſpect to the *other* party. It is to be obſerved, however, that a complete fine for each rider is due only where they have happened to ruſh againſt each other (as above) by *miſadventure*; for where they have done ſo *wilfully*, an *half* fine only is due on account of each. All that is here advanced proceeds on the ſuppoſition of the parties being *freemen*; for if they be both *ſlaves*, the blood of each is of no account*:—it is not of any account in a caſe of *miſadventure*; becauſe the offence of a ſlave affects only his own perſon, in this way, that his maſter makes his perſon over to the avenger of offence, or pays him an atonement in lieu thereof; but in the preſent inſtance the perſons of both ſlaves are deſtroyed, in ſuch a manner that the maſters have no concern with it; nor have they left any thing in lieu thereof; and hence the blood of each muſt needs be of no account:—and ſo likewiſe in a *wilful* caſe; becauſe each of them has periſhed at the time of his offence, without leaving any thing in lieu of his perſon, and in ſuch a manner that the maſters have no concern in it,—whence the blood of each muſt needs be of no account in this inſtance alſo. If one of the parties be a ſlave, and the other a freeman, then, in a caſe of miſadventure, the freeman's *Akilas* are reſponſible for the value of the ſlave, which muſt be paid to the freeman's heirs, whoſe right is extinguiſhed with reſpect to any thing beyond ſuch value;—(as if, for inſtance, the value of the ſlave were one thouſand *dirms*; in which caſe the freeman's heirs would be entitled to take, from his *Akilas*, one thouſand *dirms*, the remaining nine thouſand of the freeman's fine being remitted;)—becauſe, in conformity with the tenets of *Haneefa* and *Mohammed*, the value of the ſlave is due from the freeman's *Akilas*, as the compenſation for his [the ſlave's] perſon, for which the *Akilas* are reſponſible;—and of this the freeman's heirs are entitled to poſſeſs themſelves, becauſe it is (in effect) an *equivalent* for the ſlave;—but their right to any thing beyond the value of the ſlave drops, as the ſlave has left nothing behind him to anſwer ſuch exceſs. If, on the contrary, the parties, being a ſlave and a freeman, ruſh againſt each other *wilfully*, the freeman's *Akilas* are accountable only for *half* the value of the ſlave, (a wilful caſe only inducing *half* of the reſponſibility,) which muſt be paid to the freeman's heirs; for as, in this inſtance, a moiety of the fine for the freeman was due from the ſlave, and he left nothing except the half of his value, (as above,) they are therefore entitled to poſſeſs themſelves of the ſame, and the remainder of the half fine, beyond half the value of the ſlave, is remitted.

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* The fines here (as in all other caſes) go to the heirs of each party reſpectively.

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* Literally, "—*goes for nothing*."—The tranſlator adopts the phraſe here uſed in preference, as being ſomewhat more elegant, and expreſſing the ſenſe of the author with equal correctneſs.

The driver of
an animal is
reſponſible
[illegible]
its
[illegible], &c.
falling off.

If a perſon be driving an animal along, and the animal's ſaddle or load, or any thing elſe which may be upon it, fall off, and kill a man, the driver is reſponſible, as having been guilty of a tranſgreſſion, in neglecting to ſecure the load, or ſo forth, properly upon the animal, for if it had been ſufficiently ſecured, it could not have fallen off.

camels.

The perſon who leads a ſtring of camels is reſponſible for any thing which they may tread down. If, therefore, the camels tread down a *man*, the fine for him is due from the leader's *Akilas*, or, if they tread down *property*, he is to make compenſation for the ſame; becauſe it was his buſineſs to look to the camels, in the ſame manner as a driver; and as, where he neglects ſo to do, he is guilty of a tranſgreſſion, and tranſgreſſion occaſions reſponſibility, he is reſponſible accordingly: — but the reſponſibility for the *perſon* reſts with his *Akilas*, and that for the *property* with himſelf, as has been already explained. If there be a *driver* to the ſtring, as well as a *leader*, the reſponſibility reſts equally with both; becauſe, as the leader of one camel is the leader of the whole, ſo the driver of one is the driver of the whole, the halter of each being faſtened to the one immediately before him. This rule, however, obtains only where the driver is at the end of the whole ſtring; for if he be in the middle, and there lay hold of the halter of one of the camels, he alone is reſponſible with reſpect to ſuch damage as may be occaſioned by the camels which come after him; becauſe the leader at the head of the whole cannot be ſaid to lead thoſe, on account of the ſtring being thus interrupted; —but both are equally reſponſible for any damage occaſioned by the camels before him, ſince he *drives* thoſe at the ſame time that he leads the others.

IF a perſon faſten a camel to a ſtring of camels, with the leader's knowledge, and the camel ſo faſtened tread down a man, the fine for him is due from the leader's *Akilas*, becauſe it was in his power to have looked after and watched his camels, ſo as to prevent an additional one being joined to the ſtring; and in neglecting ſo to do he was guilty of a tranſgreſſion; which occaſions reſponſibility. Now the homicide, in this inſtance, is *homicide by an intermediate cauſe*; and the fine for it therefore falls upon the *Akilas*, in the ſame manner as in a caſe of homicide by miſadventure. But the leader's *Akilas* are entitled afterwards to reimburſe themſelves by taking the amount of the fine from the *Akilas* of the perſon who faſtened the additional camel to the ſtring; becauſe it was by his act that they became ſubjected to the payment of it; and the only reaſon why the reſponſibility

did

did not fall upon them at the firſt is, that the act of faſtening the additional camel was a ſort of creation of a cauſe, whereas the leading of the ſtring is, in the eye of the law, equivalent to the actual commiſſion of the homicide, the deſtruction having been occaſioned by the leading of the ſtring, not by faſtening the additional camel;—and as the actual perpetration of the homicide is a thing of a more forcible nature than the mere creation of the *cauſe* of it, the reſponſibility conſequently firſt falls upon the *Akilas* of the leader. Lawyers remark that what is here advanced (of the leader's *Akilas* having recourſe to the *Akilas* of the faſtener) applies only to a caſe where the additional camel was faſtened to the ſtring at a time when it was moving forwards; for as, in this caſe, the faſtener does, as it were, *direct* his camel to be led, he therefore impliedly aſſumes the reſponſibility for ſuch damage as it may occaſion:—but where the additional camel was faſtened to the ſtring at a time when it ſtood ſtill, and the leader afterwards leads it on, and a man is trodden down by this additional camel, the reſponſibility reſts with the leader's *Akilas*, who are not entitled, in this caſe, to reimburſe themſelves from the *Akilas* of the faſtener, becauſe here the leader appears to have led on the camel of another without that other's concurrence, as he has not ſignified his conſent either *expreſsly* or by *implication*.

A perſon is reſponſible for the damage occaſioned by hunting his dog at any thing;

If a perſon let ſlip * his dog, and *drive* him, (that is, *run after* him,) and the dog, without ſtopping, deſtroy any thing, the reſponſibility for it reſts with the perſon who let him ſlip, the act of the dog being attributed to him becauſe of his *driving* him;—whereas, if a perſon caſt off his hawk, and drive her, (as above,) and ſhe, without ſtopping, deſtroy any thing, the perſon who caſt her off is not reſponſible.—(The reaſon of this diſtinction between a dog and a hawk is, that a quadruped is capable of being *ſet on* or *driven*, whereas a bird is not ſo,—whence a regard is paid to the driving of the *one*, but not of the *other.*)—If, on the contrary, a perſon let ſlip his dog *without* driving him, (that is, without running after him,) and he deſtroy any thing without ſtopping, the perſon who let him ſlip is not reſponſible; becauſe, as the dog, in this inſtance, acts from his own option, his act cannot be attributed to the perſon who let him ſlip.—It is related as an opinion of *Aboo Yooſaf* that, in all thoſe caſes, the perſon who caſt off the hawk or let ſlip the dog is to be held reſponſible, out of a regard to the preſervation of property. *Mohammed* alſo obſerves, in the *Mabſoot*, that where a perſon lets ſlip or caſts off any animal upon the highway, and the animal, without ſtopping, kills a man, the reſponſibility for the ſame reſts upon the perſon who caſt it off, or let it ſlip, whether he have *driven* it, or otherwiſe, the motion of the animal being referred to the perſon who let him ſlip, ſo long as it continues to move on in a ſtraight line:—but that, upon the animal turning off to the right or left, the effect of letting it ſlip terminates,—in other words, the perſon is no longer reſponſible in caſe of any damage;—and the ſame rule alſo holds where the animal ſtops, and then moves on of itſelf; for if, afterwards, any thing be deſtroyed, there is no reſponſibility.

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* Literally, *gi* [illegible] *to*. (See *Hunting*, p. 171.)

but not u

nor where he has let him ſlip at *game.*

IF a perſon let ſlip his dog at game, and the dog deſtroy any thing elſe, without ſtopping, yet the perſon who let him ſlip is not reſponſible, provided he did not *drive* (that is, *run after*) him; for as hunting is a thing unlimitedly lawful, and is not reſtricted to the condition of ſafety, (it not being an exertion which can affect any other than the hunter himſelf,) tranſgreſſion (which is the occaſion of reſponſibility) cannot be eſtabliſhed in this inſtance. If, on the contrary, a perſon let ſlip his dog on the highway, and the dog deſtroy any thing without ſtopping, compenſation muſt be made by the perſon who let him ſlip; becauſe, although the occupancy of the highway be a matter of a neutral nature, ſtill it is reſtricted to the condition of ſafety, as being an exertion affecting the community; and the letting ſlip the dog, being an endangering of the ſafety of the highway, is therefore a tranſgreſſion, and conſequently induces reſponſibility.

A man, caſting off his [illegible] on the [illegible]s [illegible] de- [illegible]ns it commit.

If a perſon caſt off or ſet looſe an animal on the highway, and the animal move ſtraight on, and then, turning to the right or left, tread down corn, or ſo forth, the perſon who caſt it looſe is reſponſible; but not if there be more roads than one. If, on the contrary, an animal *break* looſe, and then, moving on of its own accord, kill a man, or tread down property, either by night or day, the owner is not reſponſible; becauſe the prophet has ſo ordained; and alſo, becauſe the act of the animal cannot, in this caſe, be attributed to the owner, ſince he neither caſt it off nor drove it.

For the eye of a goat an adequate [illegible]

for the eye of a [illegible]ring a fourth of the value.

If a perſon put out one of the eyes of a goat, he muſt compenſate [not for any determinate part of the whole value, but merely] for the defect thereby occaſioned; becauſe, as the only uſe of a goat is its milk or its fleſh, not its labour, nothing more can be required than merely the diminution occaſioned in its value. For the eye, on the contrary, of an ox, a camel, a dromedary, an aſs, or a horſe, of whatever deſcription, a compenſation muſt be made of one fourth of the value; becauſe the prophet has ſaid, "*For the eye of every animal except a goat ye muſt pay a fourth of the value of the animal*;"—and alſo becauſe, as the work of the animal cannot be performed but by means of *four* eyes, (two of the animal, and two of his driver,) the animal may therefore be ſaid to have *four* eyes,—whence a fourth of his value is due for the loſs of one eye.

[illegible] of da- [illegible] occa- [illegible] by an [illegible]av- ing a rider on its back,

If a perſon be riding upon his beaſt on the highway, and another perſon ſtrike or goad the beaſt, without the conſent of the rider, ſo as to cauſe it to kill a man by kicking, or treading him down, or running over him, the reſponſibility reſts upon the perſon who ſo ſtruck or goaded it, not upon the rider; becauſe the former was the inſtigator of the animal's act, which muſt therefore be referred to him; and alſo, becauſe this perſon is the producer of the *cauſe* of the accident, (for an animal naturally kicks upon being ſtruck or goaded,) and, as ſuch, is guilty of a tranſgreſſion, having goaded the beaſt without the rider's conſent; and as the *rider* has not in any reſpect tranſgreſſed, he [the goader] is therefore ſolely reſponſible.—(If, however, the rider, at the time of the other perſon ſtriking or goading the beaſt, had ſtopped it in the highway, the reſponſibility reſts upon him and the goader in equal ſhares, as in this caſe he alſo has tranſgreſſed, in having ſtopped the animal upon the road.)—If, on the contrary, the beaſt ſtrike out at the perſon who goaded or ſtruck him, as above, and he die of the kick, his blood is of no account, as he may be ſaid to have ſlain himſelf. If, on the other hand, the beaſt throw his rider, and kill him, the fine for him is due from the *Ákilas* of the goader or ſtriker, he having tranſgreſſed in producing the cauſe of the accident.

IF a perſon be riding or ſtopping upon his beaſt on his own land, and another goad or ſtrike the beaſt without the rider's conſent, and the beaſt fly out and tread down a man, the reſponſibility reſts upon the perſon who ſo goaded or ſtruck it, and not upon the rider, for the reaſons before explained.—If, on the other hand, a perſon be riding upon his beaſt on the highway, or ſtopping upon it on his own land, and another goad or ſtrike it by his deſire, and it fly out and tread down a man, neither the rider nor the other are in any degree reſponſible:—the *latter* is not ſo; becauſe his act of ſtriking or goading the animal is in ſuch a caſe tantamount to that of the rider himſelf;—nor is the *former* [the rider] ſo, as he has here authorized an act to which he is perfectly competent, the *goading* of an animal being equivalent to *driving* it. But if the rider be *moving along the road* upon his beaſt, and another then ſtrike or goad it by his deſire, and it tread down a man, both parties are reſponſible in an equal degree, provided the man was trodden down without the beaſt making any ſtop, becauſe, in this caſe, its motion is referred to both alike *.

or being led in hand.

If a man be leading an animal, and another ſtrike it, and it break away from the leader, and commit any damage without ſtopping, the perſon who ſtruck it is reſponſible; (and ſo likewiſe where the animal was *driven* by any perſon, inſtead of being *led*;) becauſe, as the breaking away of the animal was owing to the act of the ſtriker, any accident that may enſue is referred to him.

A perſon wantonly ſtriking an [illegible] miſchief, is reſponſible;

If the ſtriker, in the examples here recited, be a ſlave, he is reſponſible in his perſon for any damage which may enſue;—or, if he be an *infant*, the reſponſibility (for *property* deſtroyed, or for any perſonal injury ſhort of a *Mowzihá* wound) lies againſt his eſtate; becauſe ſlaves and infants are liable to be proſecuted for their acts.

and ſo likewiſe, a perſon who ſets any [illegible] the animal

If a beaſt be ſtruck by any thing which a perſon may have ſet in the highway, and fly out, and kill a man, the reſponſibility reſts with the perſon who placed the thing there; for as he tranſgreſſed in ſo doing, the ſtriking is therefore referred to him, the cauſe being in ef- the ſame as if he had himſelf ſtruck the animal.

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* A frivolous diſcuſſion, on this point, of conſiderable length is omitted by the tranſlator.

CHAP.

## CHAP. IV.

## Of Offences committed *by* or *upon* Slaves.

A ſlave com

muſt be made over to the

Upon a ſlave committing any offence by *miſadventure*, his maſter muſt be required either to make him over to the avenger of the offence, or to pay a redemption * for him. This is according to our doctors. *Shafeï* maintains that the ſlave's offence attaches ſolely to his perſon; whence he muſt be ſold in order to make ſatisfaction for it, unleſs his maſter agree to pay the *fine* thereby incurred. One reſult of this difference of opinion is that, according to our doctors, if the maſter, being aware of the offence, emancipate the ſlave, he is immediately ſuppoſed to prefer the mode of paying a redemptionary atonement, as above; for as he had two modes of conduct in his choice, and thus incapacitates himſelf from adopting one of them, the other conſequently remains binding;—whereas, according to *Shafeï*, the offence, after ſuch manumiſſion, is to be accounted for by the *ſlave*, not by the *emancipator*; becauſe it was to have been accounted for by means of his perſon; and as the maſter, in emancipating him, *parted* (as it were) with his perſon, the matter of courſe reſts with the ſlave. (It is to be obſerved that, concerning this caſe, a difference of opinion obtains among the companions; the opinion of *Ibn Abbas* coinciding with the tenets of our doctors, and that of *Omar* with the tenets of *Shafeï.*)—*Shafeï*, in ſupport of his opinion, argues that, in the laws concerning offences, the original principle is that the reſponſibility reſts upon the offender himſelf; but that the *Akilas* are to bear their part. Now a ſlave has no *Akilas*, for (according to *Shafeï*) a man's *kindred* are his *Akilas*; but between the ſlave and his maſter no relationſhip whatever ſubſiſts;—and ſuch being the caſe, the reſponſibility for an offence by miſadventure reſts upon the ſlave's perſon in the manner of a debt; and he will accordingly be ſold for an offence againſt the *perſon* in the ſame manner as for an offence committed upon *property*.—Our doctors, on the other hand, argue that the original principle, in the caſe of offences by miſadventure againſt the perſon, is that the reſponſibility muſt not reſt entirely upon the offender, leſt it ſhould prove ruinous to him, (becauſe he is in this inſtance excuſable, as he did not *deſign* to offend,) but that his *Akilas* muſt bear their part of it; and the maſter of the ſlave is his *Akila*; becauſe the ground of the relation of *Akila* is *ſupport* and *aſſiſtance*, and a maſter ſtands as the *ſupporter* and *aſſiſtant* of his ſlave. The reſponſibility, therefore, for an offence by miſadventure, committed by a ſlave, reſts upon his *Akila*, namely, his maſter:—but not for an offence committed upon property, the *Akilas* not bearing any part of the reſponſibility for offences of that deſcription.

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* Arab. *Fiddeeyá.*—The redemption, or redemptionary atonement, in this inſtance, muſt not be confounded with the ranſom in a contract of *Kitábat*, *Fiddeeyá* being defined "*a redemption for what is otherwiſe forfeited.*"

Objection.—If the maſter be the *Akila*, it would follow that no option ſhould be allowed to him between putting away the ſlave and paying the redemptionary atonement for him;—in the ſame manner as holds with reſpect to all other *Akilas*.

Reply.—An option has been ordained, in this inſtance, as an alleviation to the maſter, leſt the matter might prove eſſentially injurious to him. This alleviation, in fact, is requiſite in both inſtances; the only difference being that, in the caſe of other *Akilas*, it is effected by dividing the reſponſibility among the whole;—whereas, in the preſent inſtance, it is effected by giving the maſter an option of making over the ſlave, or paying the redemption; for he is only *one*, and the option is a kind of alleviation to him. The making over the ſlave is indeed what is originally required, (according to the *Rawâyet Saheeh*;)

but the maſter is thus at liberty to redeem his ſlave by paying the redemptionary atonement;—whence it is that he ſtands acquitted of all claim, and that nothing whatever is required of him, in caſe of the ſlave dying before he has made his option, as above; becauſe the ſlave was the ſubject due, which here no longer remains. It is otherwiſe in the caſe of an offender dying who is a *freeman*; for in this inſtance the fine is ſtill due from his *Akilas*, as the diſcharge of the thing incurred [the fine] is in no reſpect connected with the *perſon* of the freeman, the ſubject, in this inſtance, not being ſuch as to conſtitute a means of payment.

UPON the maſter of an offending ſlave making him over to the avengers of the offence, they become proprietors of the ſlave.—If, on the other hand, he prefer paying the redemption, the *fine* of the offence is therein included. Whether, moreover, he chuſe to make over the ſlave, or to redeem him, the ſame becomes binding upon him on the inſtant:—the making over of the ſlave is ſo, becauſe a delay in the caſe of an article exiſtent and preſent on the ſpot can anſwer no end, delay being ordained by the LAW for the purpoſe of preparation, which is not required in the caſe of a thing already prepared;—and the payment of the ranſom is likewiſe ſo, becauſe it is a ſubſtitute for the ſlave, and is therefore ſubject to the ſame rule with the ſlave himſelf. Whether, alſo, he chuſe to make over the ſlave, or to redeem him, the avengers of the offence are not at liberty to refuſe either of theſe;—not the *firſt*, becauſe it is their right; and therefore, upon the ſlave being relinquiſhed to them, their power of claim ceaſes;—nor the *ſecond*, becauſe they are only entitled to a conſideration for the offence, which being paid, the ſlave remains with his maſter.

and which-ever of theſe may be preferred maſter, (who muſt make lay,) the ſame is binding upon him.

IF the ſlave happen to die before the maſter has made his option, as above, the right of the avenger of offence is annulled, as the ſubject with which his right was connected no longer remains. If, on

The right of the is annulled by the ſlave dymaſter has declared his option.

the contrary, he die after the maſter had adopted the option of redeeming him, he [the maſter] is not acquitted by that circumſtance; but it is ſtill incumbent on him to pay the redemptionary atonement, becauſe, upon his chuſing to pay that in preference, the right of the avenger of offence is transferred from the perſon of the ſlave to *his* [the maſter's] perſon.

A ſecond offence by the ſame ſlave, is ſubject to the ſame rules.

If a maſter pay a redemption for his offending ſlave, and the ſlave afterwards commit another offence, the ſecond offence is ſubject to the ſame rules with the firſt; becauſe, upon being cleared from his firſt offence, he ſtands in the ſame predicament as if he never had offended before.

A ſlave committing two different offences is made over, in adequate proportions, to the avengers.

If a ſlave commit two offences, the maſter muſt be deſired to make him over to the two avengers of offence, in order that they may ſhare him between them according to their reſpective claims from offence; becauſe the attachment of the *firſt* offence to his perſon does not prevent the *ſecond* offence from ſo attaching; for as the maſter's right in the ſlave did not prevent it in the *firſt* inſtance, that of the firſt avenger cannot prevent it in the *ſecond*, *a fortiori*; (and the ſame rule alſo obtains where a ſlave commits *more* than two offences.)—If, therefore, a ſlave kill one man, and put out the eye of another, he is made over between the heir of the perſon ſlain, and the perſon deprived of the eye, in three portions, the fine for an eye being one half of the fine for the perſon. The ſame rule alſo obtains with reſpect to wounds;—that is, if a ſlave wound ſeveral perſons, he is made over, and divided among them, according to the injury each may have ſuſtained.

A ſlave committing a variety of offences, the maſter may - - - the

Where a ſlave commits a number of different offences, the maſter is at liberty to ſatisfy ſome of the plaintiffs by paying a redemptionary atonement, and others by making over a proportionable part of the ſlave; for the rights of all are different, becauſe of the difference in the grounds of them, namely, the *offences*, that committed upon each in particular being diſtinct and ſeparate from thoſe committed upon all the others;—whence it is lawful for the maſter to adopt a mode of ſettlement with one different from what he purſues with reſpect to another. It is otherwiſe where a ſlave kills one perſon, having two heirs;—for in this caſe it is not lawful for the maſter to pay a redemption to the one heir, and make over a proportionable part of the ſlave to the other, as the rights of both are one and the ſame in this inſtance, the offence being *one*;—whence it is not lawful to make a diſtinction in the atonements for the one offence, by giving a redemption to the one, and making over a part of the ſlave to the other.

ſeveral plaintiffs in vari-

If a maſter emancipate his ſlave who has committed an offence, of which he [the maſter] is at that time ignorant, he is reſponſible for whichever is the ſmalleſt of the two, the value of the ſlave, or the fine for the offence. *If*, on the contrary, he emancipate him, *knowing* the offence, he is reſponſible for the complete fine, to whatever amount. The reaſon of this is that, in the former inſtance, the maſter, in emancipating the ſlave, oppoſes the right of the avenger of offence, (namely, the making over of the ſlave to him,) as the ſubject to be made over no longer remains; and is therefore reſponſible: but he is ſo only for the leaſt ſum, between the value of the ſlave and the fine; becauſe, being ignorant of the offence at the time of emancipation, he cannot be accounted to act under an option, of making over the ſlave, or paying the ranſom for him, ſince he could not poſſibly make an option unleſs he were aware of the offence. In the *latter* inſtance, on the contrary, he is accounted to have adopted the option of paying the redemption; becauſe the manumiſſion of the ſlave prevents the making of him over; and upon his proceeding to emancipate him, at the ſame time that he is aware of his offence, it becomes evident that he has adopted the payment of a redemptionary atonement. What is obſerved with reſpect to theſe two inſtances applies equally to the caſes of a maſter *ſelling* his offending ſlave, or

A maſter ig- ing his offending ſlave is tc ſc eſt ſum tween the and the *val* but if he emancipate hi of fence, he is accounted to have adopted the mode of redemption, and is accordingly reſponſible for the giving him away, or making him a *Modabbir*, or (if a female) an *Am-Walid*,—all theſe acts being preventive of making the ſlave over, as they annul the maſter's right of property. It is otherwiſe, indeed, in a caſe of acknowledgment;—(that is, where the maſter in whoſe hands the offending ſlave is acknowledges [declares] him to be the ſlave of another;)—for the acknowledgment does not invalidate the right of the avenger of the offence, ſince in ſuch caſe the perſon in whoſe favour it is made will be required to make over the ſlave. This is according to the *Mabſoot*.—(*Koorokhee* maintains that acknowledgment is connected with ſale; becauſe the offending ſlave is the property of the acknowledger in appearance, and the perſon in whoſe favour it is made is entitled to him ſolely in virtue thereof, in the ſame manner as if the maſter were to declare his having *ſold* the ſlave to this perſon.)—It is proper, alſo, to remark, that as the opinion delivered in the *Mabſoot* upon this ſubject is mentioned without any reſtriction, the rule comprehends all offences whatever, whether affecting life, or otherwiſe; becauſe *fine* is equally incurred in all inſtances. It is alſo to be obſerved, that what has been ſaid of *ſale* (as being ſimilar to *emancipation*, in the caſe in queſtion) applies equally to ſale under a condition of option on the part of the ſeller; as the ſeller's right of property is extinguiſhed by this, as well as by an *unconditional* ſale. It is otherwiſe where an option is reſerved to the ſeller; or where he merely expoſes the ſlave to ſale; for in neither of theſe caſes is his right of property extinguiſhed.

and ſo, likewiſe, if he make delivery of him under an invalid ſale,

or conſtitute him a *Mokâtib*,

IF a maſter ſell his ſlave, being an offender, by an invalid ſale, is not accounted to have adopted the mode of redemption until ſuch time as he deliver the ſlave to the purchaſer; for, in a caſe of invalid ſale, the ſeller's right of property is not extinguiſhed until the article ſold be actually delivered over to the purchaſer. It is otherwiſe where a maſter conſtitutes his offending ſlave a *Mokâtib*, by an invalid contract; (as where, for inſtance, a *Muſſulman* maſter does ſo, in conſideration of *wine* or *pork*;)—becauſe, in ſuch caſe, the maſter is accounted

counted to have adopted the mode of redemption; for as, in a caſe of *Kitàbat*, a title to freedom is eſtabliſhed before the payment of the ranſom, [the conſideration of *Kitàbat*,] the maſter is therefore accounted to have adopted the mode of redemption immediately upon concluding ſuch contract.

or ſell him, (by a valid ſale,)

IF a maſter ſell his offending ſlave to the offended perſon, he is accounted to have adopted the mode of redemption [*]. It is otherwiſe where he transfers the ſlave *in gift* to the offended perſon; becauſe this perſon is entitled to take the ſlave without any recompence; and this mode of transfer is eſtabliſhed in a caſe of *gift*, although not in a caſe of *ſale*. The maſter is therefore accounted to have adopted the mode of redemption in one caſe, but not in the other.

or another emancipate him on his behalf,

IF the offended perſon emancipate the offending ſlave, on behalf of his maſter, by his [the maſter's] deſire, the caſe is ſubject to the ſame rule as where the maſter emancipates the ſlave himſelf, the act of the perſon directed being referred to the director.

or he himſelf *maim* him,

IF a maſter ſtrike his offending ſlave, ſo as to occaſion a defect in him [†], he is accounted to have adopted the mode of redemption, provided he were aware of the offence; for as, in occaſioning ſuch defect, he prevents the making over of the ſlave with reſpect to the part thus rendered defective, his making over the whole ſlave is thereby rendered impoſſible. The ſame rule alſo obtains, where a female offending ſlave is a virgin, and her maſter has carnal connexion with her, becauſe ſhe thus ſuſtains a defect. It is otherwiſe where he merely contracts her in marriage to another perſon; for this, al-

or (the offender being a virgin) deflower her;

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[*] That is, it is taken for granted that he prefers paying the full damage (and thus redeeming the ſlave) to the alternative of making him over to the offended party; and conſequently, he ſtill owes the redemption-money.

[†] Depriving him of a hand, for inſtance.

though it occaſion a defect in law, yet does not render her perſon fective; nor does it prevent her being made over; whence the maſter is not accounted to have adopted redemption in this inſtance. It is alſo otherwiſe where a maſter has connexion with his *Siyeeba* ſlave, being an offender; for ſhe does not ſuſtain any injury from ſuch connexion. It is otherwiſe, alſo, where a maſter merely uſes the ſervices of his offending ſlave; becauſe uſufruct is not particularly reſtricted to right of property;—whence it is that a condition of option [in a caſe of ſale] is not annulled by accepting ſervices [from a ſlave ſold under ſuch condition.]

But not if he pawn the offender, or let him out to hire.

If a maſter let out his offending ſlave to hire, or pawn him, he is not accounted to have adopted the mode of redemption, according to the *Zâhir Rawâyet.* In the ſame manner, he is not accounted to have adopted the mode of redemption if he permit him to trade, notwithſtanding his being in conſequence involved in debt, becauſe ſuch permiſſion does not prevent his making him over, nor does it occaſion any defect in his perſon. In this laſt caſe, however, the offended perſon may refuſe to accept the ſlave on his being tendered to him; for as he is, in this inſtance, involved in debt, by his maſter's permiſſion, *he*, therefore, is bound for his value.

A maſter, inſtigating his ſlave to commit an offence, is accounted to have adopted the mode of ion.

If a maſter offer to emancipate his ſlave on condition of his killing, ſhooting at, or wounding a certain perſon, and the ſlave act accordingly, he [the maſter] is accounted to have adopted, from the firſt, the mode of redemption. *Ziffer* is of a different opinion; becauſe neither the offence, nor the maſter's knowledge of it, was eſtabliſhed at the time of making the offer; and nothing has appeared on the part of the maſter, after the offence was committed, to manifeſt his having adopted the mode of redemption;—the caſe being ſimilar to where a man ſuſpends the divorce of his wife, or the emancipation of his ſlave, upon a particular condition, and then ſwears "that he will "not divorce his wife, or emancipate his ſlave," and afterwards the condition aforeſaid takes place, and the wife becomes, in conſequence, divorced, or the ſlave free,—in which caſe, ſtill the perſon is not forſworn, ſince nothing has proceeded from him, to occaſion divorce or emancipation, ſubſequent to his vow. The arguments of our docters upon this point are twofold. FIRST, the maſter has ſuſpended the manumiſſion of his ſlave upon the condition of his committing a particular offence; and as any thing ſuſpended upon a condition takes place on the condition being fulfilled, the caſe is therefore in effect the ſame as if he had emancipated him after the offence.—SECONDLY, the maſter has incited the ſlave to the commiſſion of the offence, namely, the killing, ſhooting, or wounding, in having cauſed his freedom to depend thereupon; and as the ſlave is naturally deſirous of freedom, it is almoſt certain that he will perform the condition. Such inſtigation, therefore, evinces that the maſter had adopted the mode of redemption from the firſt.

A ſlave, made
pated by the offended
dies in conſequence of the

IF a ſlave wilfully cut off a perſon's hand, and his maſter make him over to the offended perſon, either by a decree of the *Kázee*, or otherwiſe, and the perſon emancipate him, and afterwards die of the wound,—in this caſe the making over of the ſlave is a compoſition in full for the offence;—in other words, the offence is remitted. It would be otherwiſe if the offended perſon had not emancipated the ſlave; for in this caſe, upon his dying, the ſlave would be reſtored to his former maſter, and the heirs of the deceaſed would then be deſired either to put him to death or to pardon him. The reaſon of this is, that upon the wound proving fatal, without the ſlave being emancipated, the compoſition is made void; for a compoſition was accepted merely for this reaſon, that the penalty was apparently to conſiſt of property, retaliation not being inflicted upon a ſlave for the members of a free perſon: but upon the diſmemberment proving fatal, it appears that [a fine of] *property* was not incurred, but *retaliation*. As, therefore, the compoſition has taken place without any thing being oppoſed to it, it is conſequently null; and retaliation is incurred of courſe.—It is otherwiſe where the offended perſon emancipates the ſlave; becauſe his emancipating him evinces his deſign to be a *confirmation of the compoſition*; and the compoſition cannot be *confirmed*, unleſs it extend, not only to the offence itſelf, but alſo to every conſequence of it;—whence it is that if the offended perſon were expreſsly to declare that he receives "this ſlave in compoſition for the "offence, and for every conſequence which may ariſe from it," and the maſter aſſent thereto, the compoſition is confirmed.—In the caſe in queſtion, moreover, the maſter is aſſenting, becauſe, where he willingly makes over the ſlave as a compenſation for the diſmemberment, which is the *ſmaller* injury, it follows that he is willing to part with him as a compenſation for the *loſs of life*, which is the *greater* injury, *a fortiori*.—Upon the offended perſon, therefore, emancipating the ſlave, the compoſition implicated in the manumiſſion is confirmed; and this being a ſecond compoſition entered into *de novo*, the compoſition accepted at the firſt is null.—Where, on the contrary, he does not emancipate the ſlave, no ſecond compoſition exiſts; but the firſt compoſition is void; and conſequently, the ſlave is reſtored to the maſter; and the avengers of the offence are left at liberty either to put him to death, or to forgive him. It is mentioned in ſome copies of the *Jama Sagheer*, that if a perſon wilfully cut off another's hand, and then compound the matter with the diſmembered perſon by making over to him his ſlave,—and the diſmembered perſon emancipate the ſlave, and then die of the wound, the making over of the ſlave is conſidered as a compoſition in full for the offence; whereas, if the diſmembered perſon had not emancipated the ſlave, the heirs of the deceaſed muſt return the ſlave to his maſter, and are then deſired either to put him [the maſter] to death, or to forgive him. It is to be obſerved, however, that a difficulty ariſes concerning the determination in this inſtance; for it has been already ſaid, that "if a "perſon wilfully cut off the hand of another, and the wounded per- "ſon forgive the diſmemberment, and afterwards die, retaliation is "not to be inflicted on the perſon who gave the wound;" whereas, in

Caſe of a maſter, who having com- [illegible] wil- compounds it by a making over his ſlave to the offended party.

in the inſtance now under conſideration, retaliation is declared to be incurred.—[To reconcile this apparent inconſiſtency,] ſome ſay that the remiſſion of retaliation, in a caſe of forgiveneſs, (as here alluded to,) proceeds upon a favourable conſtruction of the LAW; and that what is mentioned in the preſent inſtance (implying that the offender is ſtill liable to retaliation) proceeds upon analogy;—whence there is, in reality, no contradiction.—Others, again, ſay that there is an eſſential difference between the caſes; for the forgiveneſs of the diſmemberment is valid and effectual in appearance, as the wounded perſon was entitled only to cut off the hand of the offender. The forgiveneſs is therefore, in appearance, complete; and although, upon the wound proving fatal, the pardon becomes void in *effect*, yet it ſtill continues in *reality*, (that is, upon the *face* of the matter;) and its exiſtence in this degree ſuffices to prevent retaliation.—In a caſe of *compoſition*, on the contrary, the compoſition does not do away the offence, but is rather a means of confirming it, the offended [wounded] perſon having agreed to a compoſition in property, and thus accepted a conſideration for the injury he has received; and as the offence is not done away, and the conſideration for it is returned, it follows that the compoſition does not prevent retaliation being inflicted. This is where the ſlave is *not* emancipated;—for where he *is* emancipated, the caſe is ſubject to the rules before ſtated.

IF a licenſed ſlave, involved in debt to the amount of one thouſand *dirms*, kill a man, and his maſter afterwards emancipate him without knowing of the murder, he is liable to pay the value of the ſlave twice, once to the creditors, and once to the heirs of the ſlain; for he has invaded two different rights,—the right of the heirs, (which is, that the ſlave be made over to them,)—and the right of the creditors, (which is, that the ſlave be ſold for payment of his debts;)—and as he would be reſponſible for the whole value, from invading either of theſe rights where they occur ſeparately, he is in the ſame manner reſponſible for each where they occur jointly.

A [illegible] involved in debt, is liable to pay his value twice, —to the creditors, and to the avenger.

Objection.—It would appear that the two rights cannot poſſibly be united, ſo that both ſhould be ſatisfied by means of the ſlave's perſon; for if the ſlave were made over to the heirs [the avengers of blood,] he could not be ſold on behalf of the creditors; and *vice verſa.*

Reply.—The two rights *may* be united, in this way, that the ſlave be firſt made over to the heirs, and then ſold on behalf of the creditors.

Objection.—If the ſlave is to be ſold on behalf of the creditors, where is the advantage in making him over to the heirs?

Reply.—The advantage is, the eſtabliſhment of the right of the heirs to releaſe the ſlave upon payment of a redemptionary atonement.

—As, moreover, the ſlave committed the offence at a time when he was occupied by debt, he is conſequently made over under the ſame predicament.—The maſter, therefore, is reſponſible for both the rights, as having invaded both.—It is otherwiſe where a ſtranger* kills, by miſadventure, a ſlave of this deſcription, (that is, *involved in debt*;) for in this caſe the ſtranger owes merely the ſingle value of the ſlave, which he muſt pay to the maſter, who again delivers the ſame over to the creditor; becauſe the ſtranger is *a priori* reſponſible to the maſter, the ſlave being his property; and as the creditor's right (to a *tranſfer* of the ſlave) is weak in compariſon with the *maſter*'s right (to the *property* of him,) it conſequently cannot come in competition with it, the caſe being, in fact, the ſame as if no other right were involved. But the creditor is afterwards entitled to take the value from the maſter, as this value is the worth of the ſlave, and the creditor's right in the worth precedes the right of the maſter, it being incumbent on him [the maſter] to ſet up the ſlave to ſale, for the diſcharge of his debts. This (it is to be obſerved) is where the ſlave is merely involved in debt, without having committed any offence; for if he had committed an offence, and a ſtranger ſlay him by miſadventure, the maſter muſt in that caſe pay the value of him to the avengers of the offence, and alſo to the creditors; but the ſtranger is only to pay the value to the maſter, in the manner above mentioned. In the caſe of emancipation, on the contrary, the maſter owes twice the value to the parties; becauſe he has invaded the rights of both; and as the right of one has no preference over that of the other, an equal regard is paid to the rights of both, and the maſter conſequently owes each a compenſation.

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* Meaning, any perſon not concerned in the ſlave, as his *creditor*, or ſo forth.

The child of a licenſed female ſlave is of her debt, but not in ſatiſfaction of her offences.

IF a licenſed *female* ſlave, involved in debt, bring forth a child, ſhe is liable to be ſold, together with her child, for the diſcharge of her debts;—whereas, if ſhe commit an offence, the maſter is not required to make over her child, as well as herſelf, to the avengers of the offence. The difference between theſe two caſes is that, in the former, as the debt, in the contemplation of the LAW, is due from the perſon of the ſlave, (in this way, that the diſcharge is to be effected by means of her perſon,) *debt* is therefore her legal deſcription; and as every legal deſcription appertaining to the perſon extends to the *offspring* of the perſon, the ſlave's debts, therefore, extend to and affect her child;—in the ſame manner as where a man pawns his female ſlave, and ſhe brings forth a child; in which caſe the child alſo is comprehended in the contract of pawn. It is otherwiſe in a caſe of offence; becauſe an offence committed by her requires that ſhe be made over in compenſation for it; but as that is a matter which reſts upon the maſter, not upon the ſlave, the *obligation of transfer* (being the legal deſcription) applies to the maſter, not to the ſlave, ſhe not encountering any thing except merely the *effect* of the transfer, which is a certain predicament, not the *legal deſcription*, or, in other words, the *obligation of transfer*;—and a *certain predicament* extends to the child, not a mere *legal deſcription*.

A perſon having declared the freedom of a ſlave cannot afterwards ſue the maſter for any offence committed by ſuch ſlave.

If a perſon make a declaration concerning another, that "he has "emancipated his ſlave," and the ſlave ſhould afterwards, by miſadventure, kill a relation of that perſon, (as his *ſon*, for inſtance,) he is not entitled to any thing on that account; becauſe, in having declared the emancipation, he throws the liability to the fine upon the ſlave's *Akilas*, and diſcharges the maſter from it: and his mere affirmation is not credited nor received as proof againſt the *Akilas*, unleſs it be ſupported by evidence:—but if he produce evidence, the *Akilas* are liable for the fine.

A freedman's allegation of his having committed an acknowledged murder "whilſt he [illegible] a "ſlave" [illegible] from reſponſibility for it.

If a maſter emancipate his ſlave, and the ſlave afterwards make an acknowledgment to a man, ſaying, "I murdered your brother, by "miſadventure, whilſt I was yet a ſlave,"—and the man aſſert that he had committed the murder after having obtained his freedom, in this caſe the allegation of the *ſlave* is credited, as he is a negator of reſponſibility, becauſe he refers the murder to a time and ſituation repugnant to reſponſibility, and which is notorious:—notorious, as this ſuppoſes a caſe in which his bondage was a matter of notoriety; and repugnant to reſponſibility, becauſe, during his bondage, it would have been incumbent on his maſter *either* to make him over in atonement for the offence, or to releaſe him by paying a redemption.—The caſe is therefore the ſame as where a perſon, being an adult, ſays "I divorced my "wife (or, *ſold my houſe*, &c.) whilſt I was yet an infant,"—or, being of ſound mind, ſays "I divorced, &c." whilſt I was inſane, (his inſanity having been notorious;)—for under ſuch circumſtances his aſſertion is to be credited, ſo far as to eſtabliſh the inefficacy of the divorce, or the invalidity of the ſale;—and ſo likewiſe, in the preſent inſtance, the aſſertion of the ſlave is credited, ſo far as to eſtabliſh his exemption from reſponſibility.

Caſes in [illegible]

If a perſon emancipate his female ſlave, and afterwards aſſert "he had ſtruck off her hand whilſt ſhe was yet a ſlave;" and

ſhe,

ſible to his emancipated ſlave.

ſhe, on the contrary, affirm that “ he did ſo after ſhe was free,” her allegation muſt be credited. The ſame rule alſo holds with reſpect to every thing taken from a female ſlave by her maſter,—excepting only her earnings *, and the enjoyment of her perſon,—for if her maſter were to ſay, “ I took your earnings,” or “ I enjoyed “ you—*whilſt you were my ſlave*,” and ſhe to reply, “ nay!—you “ did ſo after I was free,”—ſtill his allegation would be credited in either caſe, upon a favourable conſtruction.—This is according to the two *Elders*. *Mohammed* alleges that the aſſertion of the female ſlave is to be credited only with reſpect to ſuch things, actually exiſtent, as a maſter would be required to return or account for to her, according to all authorities; (in other words, that where the maſter acknowledges having taken any thing then extant in his hands, he is directed to return or account for the ſame, and that only;) and that, with reſpect to any other matter, the aſſertion of the maſter muſt be credited. The argument of the two *Elders* is, that the maſter has made acknowledgment of a fact which occaſions reſponſibility, (namely, the cutting off of a hand, or the taking of property,) as having referred his act to a time which was not repugnant to reſponſibility; (for a maſter cutting off the hand of his ſlave, or taking his property, is invariably reſponſible, in the ſame manner as a maſter who cuts off the hand of his *pawned* ſlave, or who takes property from his ſlave involved in debt;) and after having made ſuch acknowledgment, he pleads another circumſtance to exempt him from reſponſibility;—whence his aſſertion is not to be credited unleſs ſupported by evidence;—in the ſame manner as where a man, wanting his right eye, and having ſtruck out the right eye of another, alleges that “ the other had ſtruck out his right eye in retaliation,” and the other denies this, aſſerting that “ he had ſtruck out his eye at a time when “ he was already deprived of his own eye, and therefore owes him a

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* The example refers to a *female* ſlave, becauſe of the alluſion to *carnal* The rules of it, however, equally apply to *male* ſlaves in all other particulars.

"mulct for his eye,"—in which caſe his aſſertion is credited, and the former owes him a fine accordingly, as having acknowledged an act which induces reſponſibility, (namely, the ſtriking out of an eye,) without referring it to a time repugnant thereto; and after having thus acknowledged an occaſion of reſponſibility, he pleads an exemption therefrom, which the other denies; and the aſſertion of a negator muſt be credited;—and ſo likewiſe in the preſent inſtance, the declaration of the female ſlave, who is the negator, muſt be credited. It is otherwiſe with reſpect to the earnings of the ſlave, or the enjoyment of her perſon; becauſe, as a maſter is not liable to a fine of treſpaſs for having carnal connexion with his ſlave, notwithſtanding ſhe be involved in debt, nor reſponſible for taking her earnings under the ſame circumſtance,—he therefore, in theſe two caſes, refers the to a time which was notoriouſly repugnant to reſponſibility.

of an infant committing an

or an infant.

If an inhibited ſlave, or an infant, inſtigate an infant to kill a man, the infant ſo inſtigated kill the man accordingly, the fine for the man's blood is due from the infant's *Akilas*; becauſe he has actually killed the man; and the malice or error of an infant is one and the ſame,—that is, a fine is incurred equally in either inſtance, as has been already explained. A fine is therefore impoſed on the infant's *Akilas*; and nothing whatever is incurred by thoſe who directed him, (the inhibited ſlave, or infant,) as they are not liable to be taken to account for their words, nothing being cognizable except what is noticed in the LAW, which pays no regard to the words of ſuch perſons. The *Akilas*, moreover, having paid the fine, are not at liberty to reimburſe themſelves from the infant, either at preſent, or after he ſhall have attained maturity;—they may, however, require reimburſement from the ſlave ſo directing, when he ſhall have obtained his freedom; for his words were uncognizable becauſe of the right of his maſter, *not* becauſe of any defect in his natural competency; and as, on his becoming free, the right of his maſter (which was the obſtacle) no longer remains, they are then entitled to take the fine from him. It is otherwiſe with an infant; for as his words were uncognizable becauſe of a defect in his natural competency, he is therefore not liable to be ſued for the fine, either at preſent, or after having attained maturity.

Caſe of a ſlave

If one inhibited ſlave inſtigate another inhibited ſlave to kill a man, and he kill him accordingly, it is incumbent on his maſter either to make him over, or to pay his fine of redemption, without, at preſent, demanding any recompence from the inſtigator: but he is at liberty, after the inſtigator ſhall have become free, to take from him the amount of whichever is the leaſt,—the value of the ſlave he had made over, or the redemption he had paid for him. This proceeds upon a ſuppoſition of the ſlave having killed the man by miſadventure,—or, having killed him wilfully, being himſelf an infant, as the malice and error of an infant are the ſame thing:—but where the ſlave who thus kills the man is an *adult*, and kills him wilfully, he incurs retaliation, a ſlave being liable to retaliation for a freeman.

One of two heirs pardoning a ſlave, in a caſe of wilful murder, the other heir receives only his juſt proportion.

If a ſlave wilfully kill two freemen, and each of thoſe leave two heirs, and one heir of each pardon the offence, the maſter has it at his option either to make over a moiety of the ſlave to the two heirs who have *not* pardoned it, or to pay them one thouſand *dirms* as a redemption for the ſame; becauſe, upon one of each two heirs granting a pardon, retaliation is remitted, and the remaining heirs are only entitled to property; and as the ſhares of the pardoning heirs amount to one half, that half is remitted, and the other half remains due.

A ſlave
ing one man
*wilfully*, and

of the former
pardons the

If, on the contrary, a ſlave kill two freemen, one wilfully, and the other by miſadventure, and each leave two heirs, and one of the heirs of the perſon ſlain wilfully pardon the offence, and the maſter prefer paying a redemption, he muſt pay fifteen thouſand *dirms*,—five thouſand to the heir of the perſon wilfully ſlain who had not among the remaining [illegible] both,—or redeemed, at his owner's diſcretion.

granted a pardon, and ten thouſand to the two heirs of the perſon ſlain by miſadventure;—for upon one of the heirs of the perſon ſlain wilfully pardoning the offence, retaliation is remitted, and his fellow-heir remains entitled to a fine; and therefore the two heirs of the perſon ſlain by miſadventure have a right to a complete fine, namely, ten thouſand *dirms*, and the heir of the perſon wilfully ſlain, who had not granted a pardon, has a right to a *moiety* of the complete fine, namely, five thouſand *dirms*. If, on the other hand, the maſter prefer making over the ſlave, he is to be divided among the heirs in three portions, two going to the heirs of the perſon ſlain by miſadventure, and one to the unforgiving heir of the perſon ſlain wilfully.—This is according to *Haneefa*. The two diſciples, on the contrary, maintain that the ſlave is divided among the heirs in *four* parts, three fourths going to the heirs of the perſon ſlain by miſadventure, and one fourth to the unforgiving heir of the perſon ſlain wilfully. The diviſion, therefore, according to them, is to be determined by the litigation; in other words, in the degree in which the right of any of the parties attaches without litigation from the others, he receives a proportion; and in the degree in which the litigation obtains, the diviſion is made equally. Now, in the caſe here conſidered, *one* moiety of the ſlave is reſerved to the two heirs of the perſon ſlain by miſadventure, without litigation on the part of any other perſon, and goes to them accordingly; but with reſpect to the *other* moiety, there is a litigation between the two heirs of the perſon ſlain by miſadventure, and the unforgiving heir of the perſon ſlain wilfully; and therefore it is divided equally between the one heir on the one part, and the two heirs on the other part. The argument of the two diſciples, in ſupport of this determination, is that the right of the two heirs of the perſon ſlain wilfully is connected with the *whole* of the ſlave's perſon: but upon one of them granting a pardon, his right becomes extinct, and of courſe a moiety of the ſlave is diſengaged, and the right of the two heirs of the perſon ſlain by miſadventure attaches to it, without litigation, whence it goes to them; and there then remains the other moiety, with which is connected the right of the two heirs of the perſon ſlain by miſadventure, and alſo of the unforgiving heir of the perſon ſlain wilfully;—and as this is equally divided among them, the two former, therefore, get one half of ſuch moiety, and the latter the other half; and thus, of the whole, three fourths go to the two heirs of the perſon ſlain by miſadventure, and one fourth to the unforgiving heir of the perſon ſlain wilfully; as above ſtated. According to *Haneefa*, on the contrary, the ſlave is divided among the heirs (as above ſtated) in three portions, by the rule of fractional arithmetic*; becauſe of their right being equally connected with the ſlave's perſon†;—in the ſame manner as where a perſon dies inſolvent;—in which caſe his eſtate is divided among his creditors by the rule of fractions.

A ſlave, being
[illegible]
partn
and forgiven
of a murder
[illegible]
bloodſhed is
of no account.

IF a ſlave held in partnerſhip by two perſons murder a man whoſe heirs are thoſe two partners, and one of them pardon him, retaliation is remitted, and the blood of the ſlain is of no account, according to *Haneefa*.—The two diſciples maintain that in this caſe the partner who grants the pardon muſt make over a portion of his ſhare (namely, a quarter) to the other partner, or elſe muſt pay him a fourth of the complete fine of blood, as a redemptionary atonement.—The reaſons they allege are, that a maſter is entitled to execute retaliation upon his ſlave; for a maſter's property in his ſlave does not oppoſe his right to retaliation, the ſlave, with reſpect to his blood, remaining in the original ſtate of MAN, namely, *freedom.*—Now, retaliation being incurred on behalf of both maſters, an half of it is therefore, in an indefinite manner, incurred on behalf of each of the two; and the moiety of the half of each, reſpectively, is of courſe involved in the other's half. But upon one of them granting a pardon, the other's right to retaliation is annihilated, and he then becomes entitled to property, indefinitely, in the ſame manner as he had been before entitled to indefinite retaliation; and one *half* of his right, therefore, (which is a fourth of the whole,) is converted into property, with reſpect to his ſhare; and then becomes extinguiſhed *in toto*, (in other words, fails even with reſpect to the exchange for retaliation, namely, property,) as a maſter cannot be a claimant of debt againſt his ſlave; and the other half of the right (which is likewiſe a fourth of the whole) is converted into property, with reſpect to the ſhare of the other partner, who granted the pardon, and conſequently does not drop, but he is deſired either to make over a moiety of his ſhare (namely, a fourth of the ſlave) to his copartner, or to pay a redemption to the amount of a fourth of the fine of blood in lieu thereof.—The argument of *Haneefa* is that, as retaliation is due on behalf of both maſters indiſcriminately, it therefore bears the conſtruction of being due on behalf of each in particular, with reſpect either to the *whole* of the ſlave, or the *half* of him,—in this way, that the right of each, (namely, an half) is connected with his own particular ſhare,—or, in this way, that the right of each is connected with the other's ſhare,—or, in this way; that a moiety of the right of each is connected with his own particular ſhare, and a moiety with the ſhare of his partner, indefinitely and without diſcrimination; and on none of theſe ſuppoſitions is there any obſtacle to retaliation, as all the parts of a ſlave are alike with reſpect to retaliation, no one of them in regard to it being leſs than another.—Upon the right, therefore, of one of the maſters being converted into property by the other granting a pardon, there is a poſſibility of the *whole* of his right being due to him, conſidering his whole right as connected with his partner's ſhare; and it is alſo poſſible that the whole of his right is extinct, conſidering his whole right as connected merely with his *own* ſhare; and it is likewiſe poſſible that an half of his right is due to him, conſidering one half of his right to be connected with his own ſhare, and another half with the ſhare of his partner, indefinitely;—and hence there is a doubt with reſpect to the obligation on the other partner: and any circumſtance of doubt, in a matter of property, prevents the eſtabliſhment of a claim.

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* Arab. *Zirb-wa-awl*; literally, "*multiplication*

† The tranſlator here omits the *proceſs*, which has no place in the *Arabic* verſion, and in teaches a moſt circuitous mode of practice for ſolving a very plain queſtion. As, however, it is ſomewhat curious, he conceives it adviſeable not entirely to omit it.—"Now, "the right of the heirs of the two perſons ſlain by miſadventure is ten thouſand *dirms*, and "that of the unforgiving heir of the perſon ſlain wilfully is five thouſand.—The propoſition, "therefore, contains a *whole* and an *half*.—Hence we muſt take for the denominator "the ſmalleſt number which admits of ſubdiviſion, namely, *two*, by which the fractional "number [being multiplied] is reſolved into three [integral parts;]—and the two heirs by "miſadventure take in the proportion of the whole, namely, *two* parts; and the unforgiving heir takes in the proportion of the half, namely, *one* part."

## SECTION.

**A ſlave by miſadventure muſt be accounted for to the amount of his value, as far as nine thouſand nine**

IF a perſon kill a ſlave by miſadventure, he is reſponſible for the value of ſuch ſlave, provided it do not exceed ten thouſand *dirms*; but if it amount to ten thouſand *dirms* or above, he is directed to pay ten thouſand *dirms* excepting ten, (that is, nine thouſand nine hundred and ninety;) and where, on the other hand, the value of a *female* ſlave (ſuppoſing the one killed to be ſuch) equals or exceeds the fine for her blood, the perſon who killed her is directed to pay five thouſand *dirms* excepting ten.—This is according to *Haneefa* and *Mohammed*. *Aboo Yooſaf* and *Shafeï* maintain, that the perſon who kills the ſlave is reſponſible for the value to whatever amount; becauſe the reſponſibility is in conſideration of the *worth* not of the *blood*; (whence it is that it holds on behalf of the ſlave's *maſter*, who is proprietor only with regard to the *worth*, not with regard to the *blood*, with reſpect to which a ſlave is in his natural ſtate of freedom;) for if it were in conſideration of the blood, it would neceſſarily follow that the ſlave would be the proprietor of the atonement, not the *maſter*.—Thus, for inſtance, if a ſlave, having been ſold, be killed in the hands of the ſeller before the purchaſer obtains poſſeſſion, the contract of ſale ſtill continues in force; which evinces that the reſponſibility is a return or compenſation for the worth; for otherwiſe the contract would not continue, the continuance of that being becauſe of the continuance of the value, whether the original property remain, or only the *return* for it; and notwithſtanding the original property, in ſuch inſtance, no longer remain, yet ſtill the *return* for it does ſo, whence the ſale continues, in conſideration of the continuance of the return for the article ſold, namely, the *value* thereof;—whereas, if the reſponſibility were in conſideration of the blood, the contract of ſale would be entirely diſſolved, ſince on this ſuppoſition the value of the article ſold does not remain in any ſhape whatever. The ſlave in queſtion, therefore, where his value equals or exceeds the amount of the fine for his blood, is conſidered in the ſame light as one whoſe value falls ſhort of the fine*;—or as an *uſurped* ſlave, who, if he periſh in the uſurper's hands, muſt be accounted for at the rate of his full value, whatever that may be. The arguments of *Haneefa* upon this point are twofold.—FIRST, the word of GOD has impoſed the fine for erroneous bloodſhed unreſtrictively, (that is, in a way which comprehends [*Muſſulman*] *ſlaves*, as well as *freemen*;) for the text of the KORAN ſays, "WHOSOEVER KILLETH A BELIEVER BY MISTAKE, *the penalty of it ſhall be* THE FREEING OF A BELIEVER, AND A FINE, *to be paid* TO THE HEIRS OF THE DECEASED."—A fine, therefore, is due; and as the fine is a conſideration for the blood, which never exceeds ten thouſand *dirms*, that ſum only is due, in the ſame manner as holds in the caſe of a freeman.—SECONDLY, in the ſlave two different qualities are ſaid to exiſt;—one, the quality of *humanity*, underſtood in a being endowed with underſtanding, reflec- ı, apprehenſion, and memory; and another, the quality of underſtood in a ſubject fit for the uſe and purpoſes of the individual.—In a ſlave, therefore, there are two modes or characters, the character of humanity, and the character of worth[*]. Now, the former of theſe is ſuperior to the latter; and it is a rule that where two characters or modes occur together, diſagreeing in their laws, regard muſt be paid to the *ſuperior* character, not to the *inferior*. Here, moreover, it is impoſſible to pay attention to *both* characters; for the character of *humanity* requires that the reſponſibility be fixed to the amount of the fine of blood, whereas the character of *worth* requires that it extend to the whole value of the ſlave, to whatever amount;—and regard muſt be paid to the character of *humanity* in preference, as that is the ſuperior. With reſpect to the caſe of uſurpation, adduced by *Aboo Yooſaf* and *Shafeï*, it is of no weight; becauſe the reſponſibility, in that inſtance, is in conſideration of *worth* only, uſurpation holding only with reſpect to property. With reſpect, moreover, to what they ſay concerning ſale, that "the contract of ſale ſtill continues, "becauſe of the continuance of the return for the article ſold, namely, "the *value* thereof,"—it is not admitted; for as a contract of ſale endures even where the ſlave, who is the ſubject of it, is *wilfully* murdered in the hands of the ſeller, and before the purchaſer has obtained poſſeſſion of him, notwithſtanding retaliation be not a return for worth,—ſo likewiſe in a caſe of fine. With reſpect to a ſlave whoſe value is ſhort of the fine, there likewiſe the recompence for MAN is due; namely, the fine. As, however, the amount of the fine was not fixed by the LAW[†], it is therefore, in this inſtance, eſtimated by the value; *for here it* is poſſible to aſcertain the deficiency between the *recompence* for the ſlave and the recompence for a freeman *by reverting to the* value, which is ſhort of the fine; and *regard is paid to that* accordingly. It is otherwiſe where the value of the ſlave *exceeds* the fine; for it is here impoſſible to aſcertain the deficiency with regard to the value, as that exceeds the value of a freeman, namely, the fine, which fixes the value of a freeman at ten thouſand *dirms*. (The fine for a ſlave is eſtabliſhed at a rate *ſhort* of the fine for a freeman, in order to evince the inferiority of his rank; and the difference is fixed at ten *dirms*, on the authority of *Abdoola Ibn Abbas*.)

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* That is to ſay, his *value* muſt be paid by the murderer.

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[*] Arab. *Maleeat.*—We have no word in our language preciſely correſponding with i The tranſlator (to avoid a paraphraſis) generally expreſſes it by the term *worth.*—It is derived from *Mâl* [property,] and ſignifies *the quality of being* (or conſtituting) *property*; and, to underſtand this paſſage, that ſenſe muſt be annexed to it.

[†] The amount of fines is not fixed by the KORAN, but by the *Sonna.*—The reaſon of the diſtinction here is, that if it had been determined by the KORAN, it would be conſidered as *abſolute*, and therefore not to be ſwerved from in any inſtance.

The hand of a ſlave is accounted for as far as four thouſand nine hundred and ninety-five *dirms*.

For the hand of a ſlave half his value is incurred, provided that do not exceed four thouſand nine hundred and ninety-five *dirms*; the [illegible] man being equivalent to half his perſon. In ſhort, the *value*, with reſpect to a ſlave, is the ſame as the *fine* with reſpect to a freeman; and therefore, in all caſes where a fine is due for a freeman, the value is due for a ſlave; where an half fine is due on account of the one, an half of the value is due on account of the other; and ſo forth;—becauſe the value of a ſlave is ſimilar to the fine for a freeman, as being (like that) a recompence for his blood.

Caſe of a ſlave who being maimed, and then emancipated, dies of the wound.

If a perſon wilfully ſtrike off the hand of a ſlave, and the ſlave's maſter afterwards emancipate him, and he then die in conſequence of the maiming, in that caſe, provided the freedman have other heirs beſides his maſter, retaliation is not incurred by the offender;—whereas, if he have no other heirs, it muſt be inflicted. This is according to *Haneeſa* and *Aboo Yooſaf*. *Mohammed* maintains that retaliation is not incurred in either caſe; but that a mulct for the hand is due from the maimer, together with any deficiency occaſioned, by the maiming, in the value of the ſlave, between the time of diſmemberment and emancipation,—and the reſt of his value is altogether remitted. Thus, for inſtance, if the value of the ſlave, at the time of diſmemberment be one hundred *dirms*; in this caſe one half of his value [fifty *dirms*] is incurred by the diſmemberment, and then, if, at the time of his emancipation, his value have diminiſhed to the amount of ten *dirms*, thoſe ten are alſo incurred; and thus ſixty *dirms* are due, and forty are remitted. Retaliation is not incurred on the *former* ſuppoſition, [that is, ſuppoſing the freedman to leave other heirs beſides his maſter,] according to all the doctors; becauſe it is in this caſe uncertain who is the claimant of right; (for retaliation is incurred on the occurrence of the death, that being at the ſame time referable to the wound; and therefore, if regard be paid only to the time of the *wound*, the *maſter* is the claimant; or if, on the other hand, regard be paid to the time of the *death*, the *heirs* are the claimants;) and ſuch being the caſe, it is impoſſible to exact retaliation, which therefore utterly ceaſes, —inſomuch that if both parties [the maſter and the heirs] were to unite in claiming retaliation, ſtill it is not to be inflicted, as their coalition does not diſpel the doubt, the right of the maſter having exiſted at the time of the wound, not at the time of the death, and that of the heirs (on the contrary) at the time of the death, not at the time of the wound.—The reaſons alleged by *Mohammed* why retaliation is not to be inflicted in the inſtance in which he differs from the two *Elders*, (that is, where the ſlave leaves no other heirs than his maſter,) are twofold.—First, the grounds of authority for exacting retaliation are here various; for, looking to the time of the wound, the ground is, the maſter's right of property in his ſlave; whereas, looking to the time of the death, it is, the *Willa* of manumiſſion *; and a diverſity in the grounds is the ſame as a difference in the claimants, in all matters where caution is neceſſary, ſuch as puniſhment or retaliation, or as where, for inſtance, a man ſays to the owner of a female ſlave, "You have ſold me this ſlave for ſo much," and the other replies, "No! I have contracted her to you in marriage,"—in which caſe it is not lawful for the man to have connection with the ſlave, as the grounds of her claim are different, ſince, looking to ſale, it is *right of property*, and looking to marriage, it is the *connubial* right.—SECONDLY; the emancipation precludes the conſequence *; and becauſe of the conſequence being thus precluded, the wound remains independent of its conſequence, and the conſequence occurs independent of the wound, the caſe being the ſame [on the ſlave's afterwards dying] as if he had periſhed by the viſitation of heaven;—whence retaliation is prevented.—The arguments of the two *Elders* are that although the two grounds of claim be contrary, yet the maſter has an indiſputed authority to exact retaliation, that appertaining to him in every view; and the legal effect of both grounds is moreover one and the ſame, namely, retaliation;—thus the claimant, (namely, the maſter,) the thing claimed, (namely, retaliation,) and the perſon upon whom the claim is made (namely, the offender) are known and aſcertained; and as the exacting of retaliation is therefore poſſible in this inſtance, it muſt be decreed accordingly.—The difference in the grounds of claim, moreover, are not to be regarded in this inſtance, as it does not occaſion any difference in the legal effect.—It is otherwiſe on the firſt ſuppoſition †; for there the claimant is unknown.—It is alſo otherwiſe in the caſe of the female ſlave; becauſe there the legal effect differs according to the difference in the grounds of legality; for the right of property is different from the right of marriage in point of legal effect, the legality of connexion eſtabliſhed by a contract of marriage being a thing eſſential to and involved in it, whereas the ſame legality eſtabliſhed by a right of property is not an eſſential, but merely follows as a dependant. With reſpect, alſo, to what is advanced by *Mohammed*, that "the emancipation precludes the conſequence,"

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* Which entitles the emancipator to ſeek ſatisfaction for the death of his freedman. (See Vol. III. p. 436.)

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* Arab. *Sirrùyet.*—The definition of this term has been given before. (See p. 344.) The meaning of the phraſe here is, that the emancipation precludes the legal effect of the ſlave's death taking place upon the offender.

† That is, ſuppoſing the freedman to have other heirs beſides his emancipator.

“ quence,” it may be replied, that the emancipation precludes the conſequence only becauſe of its rendering the claimant doubtful and unknown. Now *that* holds only in a caſe of *miſadventure*, not in a caſe of *malice*. In other words, if a perſon cut off the hand of a ſlave by miſadventure, and the diſmemberment prove fatal after manumiſſion, retaliation is not incurred, but a fine for the *hand* only, together with the diminution occaſioned in the ſlave's value by the maiming between that time and his emancipation, becauſe it is in this caſe uncertain who the claimant of the right is, a ſlave being incapable of poſſeſſing property; and therefore, looking to the time of the wound, the *maſter* is the claimant of the right;—whereas, if the time of the *death* be regarded, the *ſlave* is the claimant, as he is then free;—and regarding, alſo, the time of the wound, the *value* of the ſlave is incurred; but regarding the time of the death, the fine of blood is incurred as he is then free. The claimant, and the thing claimed, are therefore both uncertain in this caſe;—and as an ignorance concerning the *claimant* alone prevents the conſequence, it follows that an ignorance concerning both the claimant and the thing to be claimed prevents the conſequence, *a fortiori*. In a caſe of *malice*, on the contrary, the legal effect is retaliation; and as a ſlave ſtands, with reſpect to his blood, in the original ſtate of MAN, namely, freedom, he is therefore entitled to retaliation; but this is to be exacted by his emancipator, as being the avenger of his blood; and as the freedman [in the inſtance here ſuppoſed] leaves no other heirs beſides his maſter, the claimant of the right, therefore, is known and aſcertained.—It is to be obſerved, that as, according to *Mohammed*, retaliation is prevented in both caſes, a fine is due for the hand, together with the diminution occaſioned in the value of the ſlave on account of the time elapſed between the wound and the emancipation, (as already mentioned,) becauſe the wound was given during the maſter's right of property;—and nothing beyond thoſe is allowed. According to the two *Elders*, on the contrary, in the firſt of thoſe caſes only a fine for the hand is due, together with the diminution occaſioned in the value, as aforeſaid.

Caſe of an [illegible] definitely declares *one* of them *free*.

If a maſter ſay to two of his ſlaves, " one of you is free," and a perſon then ſtrike and wound both the ſlaves upon the head, and the maſter afterwards ſpecify the one whom he deſigned to emancipate by the above ſpeech, ſtill he is entitled to the recompence for the offence committed upon both; for he emancipated an *un*ſpecified ſlave; and the wounds have been received by *ſpecific* ſlaves; and as what is *ſpecific* is *one* thing, and what is *un*ſpecified is *another*, they are *both*, therefore, his property, with reſpect to the offence. If, on the other hand, a perſon were thus to *ſlay* the two ſlaves in queſtion, he incurs a fine for the one emancipated *, (payable to his heirs, if he leave heirs, or otherwiſe to the maſter,) and the value of him who was to have remained in bondage, payable to the maſter,—provided that the murderer be one perſon, and have ſlain the two *together*, (not *ſucceſſively*,) and that the value of both be equal †. If, on the contrary, the two ſlaves be murdered by the one perſon *ſucceſſively*, (that is, one after the other,) he incurs the value of the one *firſt* ſlain, payable to the maſter, and a fine for the other, payable to his heirs; becauſe, by one of them being ſlain, the emancipation is, of neceſſity, determined to the other. If, on the other hand, the two be ſlain by the one perſon *together*, and they be of different value, the murderer incurs a moiety of the value of each, reſpectively, together with a fine for a freeman; becauſe he has, to a certainty, killed a freeman and a ſlave; and the murder of the one ſubjects to a fine, and of the other to the value; and neither of them precedes the other. The murderer, therefore, in this inſtance, owes one half of the value of each, together with an half of the *fine* for each; for as, in conſequence of the death of both, no ſubject remains for the maſter's explanation, the emancipation indiſcriminately pronounced by him applies in an indefinite manner to each.

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* That is, the one to whom the maſter afterwards explains his indefinite emancipation to have applied.

† The reaſons for this diſtinction between a caſe of murder and of wounding are here ſtated at large.—The tranſlator, however, conceives himſelf juſtified in omitting them, as they involve a long train of metaphyſical ſubtleties of no uſe, and the ſubſtance of which are to be found under the head of *Indiſcriminate Manumiſſion*. (See Vol. I. p. 456.)

Caſe of a perſon putting out the eyes of another's ſlave.

a perſon put out both the eyes of another's ſlave, the owner has it in his option either to make over the ſlave to the offender, taking from him the value, or to retain the ſlave, without getting any thing for the defect thus occaſioned in him. This is the doctrine of *Haneefa*. The two diſciples maintain that the maſter has it in his option either to keep the ſlave, taking a compenſation for the damage he has ſuſtained, or to give him to the offender, taking the whole of his value. *Shafeï*, on the contrary, holds that the maſter is entitled to keep the ſlave, taking, at the ſame time, his complete value; for as the reſponſibility is oppoſed to what is *deſtroyed*, not to what *remains*, (in the ſame manner as in the caſe of a *freeman*,) this remainder, therefore, ſtill continues the property of the maſter;—as where, for inſtance, a man ſtrikes off one hand of a ſlave, and puts out one of his eyes; in which caſe the offender incurs the whole value of the ſlave, who ſtill remains with his maſter; and ſo here likewiſe. (It is proper to obſerve, in this place, that our doctors maintain that worth * exiſts in the perſon; but regard is alſo paid to it with reſpect to the members of the body, for otherwiſe any regard to it with reſpect to the perſon (ſo as to be confined to that alone) muſt be nugatory, ſince as the members of the body are held equivalent to property, for the ſecurity of the body †, it follows that a regard to the worth,

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* *Makeeat*; it has been already explained to ſignify the *quality of being*
This whole paſſage is ſomewhat enigmatical, and (to underſtand it properly) requires that a ſtrict attention be paid to the context.—It is altogether detached from the queſtion in diſpute.

† With a view to protect the body from the injuries it might otherwiſe be liable to, *in*

*its*

worth, in the members, is of prior conſideration. As, therefore, worth is regarded in the members of the body, as well as in the perſon, and, in the caſe in queſtion, the perſon alſo is deſtroyed in ſome degree, (for one of the bodily faculties has been totally deſtroyed,) and the reſponſibility is (conſequently) to the amount of the complete value, it is requiſite that the offender become proprietor of the body of the ſlave, in order that he may not be ſubjected to injury, and that an equality may be eſtabliſhed. It is otherwiſe where a perſon puts out both the eyes of a freeman; becauſe a freeman does not poſſeſs the quality of *worth*[*]. It is alſo otherwiſe where a perſon puts out the eyes of a *Modabbir*; becauſe a ſlave of that deſcription is incapable of paſſing from the property of one perſon to that of another. It is likewiſe different where a perſon ſtrikes off one hand of a ſlave, and puts out one of his eyes; for in this caſe no one faculty is completely deſtroyed.) The argument of the two diſciples is, that as the quality of *worth* exiſts in the ſlave, and as the ſituation to which the ſlave is reduced admits of two different conſtructions,—a deſtruction of the perſon[†], or a deſtruction of the members,—it is therefore requiſite that the maſter have it at his option either to deliver over the ſlave, and take the full value, on the *former* of theſe conſtructions; or, on the *latter* conſtruction, to keep the ſlave, and take a compenſation for the damage he has ſuſtained[‡]; as in all other caſes of property;—this being analogous to where a perſon tears another's robe to pieces, in which caſe the owner of the robe has it at his option either to make over the robe and take the value, or to retain the robe and take a compenſation for the damage. The argument of *Haneefa* is that, although

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*its members*, owing to the careleſſneſs or incautiouſneſs of others;—for if the members were not held equivalent to property, (in other words, if no fine were impoſed for injuries to them,) the body (of which the members are a part) would not be effectually protected.

[*] In other words, "*does not poſſeſs the capacity of being*

[†] Becauſe a complete deſtruction of one of the faculties is accounted a deſtruction of the *whole man*.

[‡] Literally, "*and take the difference occaſioned in his*

*worth* be regarded both in the perſon and in the members of the body, ſtill the character of HUMANITY alſo exiſts in the perſon and members of a ſlave, and has not been totally extinguiſhed by his bondage. Now, it is to be obſerved that one of the rules of HUMANITY is, that the penalty incurred by an offence be *not* divided between the perſon and the member deſtroyed, but oppoſed to the latter alone; and (conſequently) that the property of the body * be not transferred, (as where, for inſtance, a perſon puts out both the eyes of a *freeman*;) and that therefore the maſter is to take the whole value in compenſation for the thing deſtroyed, the body remaining as it was;—and, on the contrary, one of the rules of *worth* is, that the compenſation for an offence be divided between the whole perſon and the particular member deſtroyed; and that therefore the maſter is to take the defect occaſioned in the value, as a ſatisfaction for the member deſtroyed, at the ſame time keeping the body [*Juſſä*] as before. We therefore (ſays *Haneefa*) pay attention to both theſe characters; and accordingly, looking to the character of HUMANITY, we determine that the compenſation is *not* divided (as above,)—for if we were to ſay that the maſter is to take the difference occaſioned in the value, and retain the body [*Juſſä*,] it would induce a total neglect of the character of HUMANITY, and would cauſe the character of *worth* alone to be regarded, (as is determined by the two diſciples;)—and looking, on the other hand, to the character of *worth*, we determine that the maſter is not at liberty to take the whole of the value, and alſo retain the perſon of the ſlave, (as is determined by *Shafei*,) for in this caſe a regard is paid to HUMANITY alone, and the regard to worth is altogether loſt.

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* Arab. *Jaſſa.*—It is defined, by the *Arabian* lexicographers, " *the figure of a*
meaning (perhaps) a man independant of his qualities or faculties; and it therefore
to a *mutilated* as well as to a *complete* body,—whence the uſe of it in this place.

## SECTION.

### *Of* OFFENCES *committed by* MODABBIRS *and* AM-WALIDS *.

The maſter countable for their offences, alleſt be- the fine and the value.

IF a *Modabbir* or *Am-Walid* commit any offence, the maſter is accountable for the leaſt of the two, the value of the offender, or the fine for the offence.—The *maſter* is thus accountable; becauſe it is recorded of *Aboo Abeeda* that he once decreed the offence of a *Modabbir* to be accounted for by his maſter; and alſo, becauſe, as the maſter, by having conſtituted the offender a *Modabbir* or an *Am-Walid*, counteracts (as it were) the regulation of making him [or her] over, the caſe is therefore, in effect, the ſame as if he had ſo done after the offence, and at a time when he was not aware of it.—He is alſo accountable for the leaſt of the two, the value, or the fine, (as above,) becauſe the avenger of the offence is not entitled to any thing beyond the FINE for it; and the maſter, by having conſtituted the offender a *Modabbir* or *Am-Walid*, counteracts the regulations merely to the amount of the value, not with reſpect to *more* than the value.

OBJECTION.—The avenger of the offence not being entitled to any thing more than the fine, and the maſter (by having conſtituted the offender a *Modabbir* or *Am-Walid*,) having counteracted the regulation merely to the amount of the value, it would follow that the maſter ſhould have it in his choice to give either the value or the fine, in the ſame manner as, in the caſe of an abſolute ſlave, the maſter has it in his choice either to make over the ſlave, or to pay the redemption.

REPLY.—An option in this inſtance is attended with no manner of advantage, as the fine for an offence and the value of a ſlave are of the ſame kind, and it is certain that the maſter will chuſe that which is the ſmalleſt.—It is otherwiſe in the caſe of an abſolute ſlave; for as a ſlave is a ſpecific article, and men frequently feel an attachment to ſuch, it is therefore poſſible that, in this inſtance, the maſter might prefer paying the redemption, although that be more than the value of the ſlave; and hence there is an advantage in leaving him an option.

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* That is, by *untransferable* ſlaves.

THERE is no fine incurred for the numerous offences of a *Modabbir*, beyond one payment of his value, notwithſtanding they be committed in immediate ſucceſſion; becauſe the maſter, by having created his ſlave a *Modabbir*, has counteracted the regulation with reſpect only to one individual ſlave; and alſo, becauſe paying the value is equivalent to giving up the ſlave; and as a maſter cannot make over his ſlave more than once, ſo in the ſame manner he is not required to pay the value more than once.—When, therefore, a maſter pays the value of his *Modabbir* on account of ſeveral diſtinct offences, the avengers of the offence are to divide it among them, each taking in proportion to his reſpective ſhare.—It is to be obſerved, however, that as regard muſt be had to the value the *Modabbir* bore at the time of the offence, attention is therefore to be paid, on behalf of each claimant, to his value on the day in which the offence was committed on him, as it is on that day that the oppoſition of the maſter operates.—Hence if a *Modabbir* kill a perſon by miſadventure, at a time when his value is one thouſand *dirms*, and afterwards kill another by miſadventure, at a time when his value has increaſed to fifteen hundred *dirms*, the heir of the *firſt* ſlain perſon is not entitled to any proportion out of the exceſs five hundred, but that goes entirely to the heir of the *ſecond* ſlain perſon, and the two ſhare the remaining thouſand between them, according to their reſpective rights.—Now the right of the firſt is to ten thouſand *dirms*, and the right of the ſecond to nine thouſand five hundred *dirms*, (for he has received five hundred.) The whole right of both is therefore to be divided into thirty-nine equal lots, each lot

The l penalty, for *numerous* offences of a *Modabbir*, is one payment of his value;

correſponding

correſponding with five hundred *dirms* of the complete fine; and conſequently the firſt heir gets twenty lots, and the ſecond nineteen.

nor is the owner re- thing on account of his offences, after having made

If a *Mobabbir* commit an offence*, and his owner pay the value of him to the avenger of the offence, by order of the magiſtrate, and the ſame *Modabbir* afterwards commit another offence, the owner is not accountable for any thing, becauſe, in before paying the value, he acted upon compulſion, in conſequence of the magiſtrate's order. ſecond avenger, however, is in this caſe entitled to ſhare the value with the firſt avenger. If, on the contrary, the owner have paid the value to the firſt avenger without an order from the magiſtrate, the ſecond avenger has it in that caſe at his option either to require a fine for the offence from the maſter, or to have recourſe to the firſt avenger for his proportion of the value. This is according to *Haneefa.* The two diſciples maintain that, in this laſt inſtance, the ſecond avenger has no claim whatever on the maſter; becauſe he [the maſter] has already paid all that was incumbent on him to a proper claimant, as at that time no ſecond offence had taken place. The argument of *Haneefa* is that as the owner of the *Modabbir* has unjuſtly given to the firſt avenger what is the right of the ſecond avenger, and as the firſt avenger (on the other hand) has unjuſtly *taken* the ſame, the ſecond avenger has therefore an option, as above. The ground of this is that the ſecond offence is, in the eye of the LAW, aſſociated with the firſt in one ſhape; for the ſecond avenger is made to participate with the firſt;—and the ſecond offence is alſo, in the eye of the LAW, a *follower* of the firſt, in another ſhape; for, with reſpect to the ſecond avenger, regard is paid to the value of the *Modabbir* at the time of the ſecond offence. The ſecond offence, therefore, is conſidered as aſſociated with the firſt, ſo far as regards taking the compenſation either from the maſter or from the firſt avenger, becauſe of each of them having diſregarded the right of the ſecond avenger, in order that a due attention may be paid to both points of view, —to the *non*-aſſociation, where the value has been given [to the firſt avenger] by order of the magiſtrate, and to the aſſociation, where it has been given without his order;—for it is not poſſible that the ſecond avenger ſhould have it in his choice to take his compenſation from either party, except where the two offences had been perpetrated together.

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* Always meaning *homicide by miſadventure*, this being the only offence which involves the ſlave's value.

nor for more

him after a variety of offences.

If a *Modabbir* commit a variety of offences, and his owner then emancipate him, he [the owner] is not accountable for more than one payment of his value; becauſe he was ſubjected to this reſponſibility only in conſequence of having conſtituted the offender a *Modabbir*, an act *a priori*; and his emancipating him, or otherwiſe, afterwards, is one and the ſame. (It is to be obſerved that an *Am-Walid* is conſidered in the ſame light as a *Modabbir*, with reſpect to all theſe rules.)

cognizable.

A Modabbir's acknowledgment of an offence by miſadventure is not admitted, nor does it ſubject the maſter to any penalty, whether he have emancipated him or otherwiſe; becauſe the penalty for any offence by miſadventure, committed by a ſlave, reſts upon his maſter; and the maſter is a different perſon from the *Modabbir*; and therefore the acknowledgment of the latter, as tending to effect another than himſelf, is not valid.

# CHAP. V.

## Of Offences committed upon uſurped Slaves, or Infants, during the Uſurpation.

A perſon uſurping a maimed ſlave, who afterwards dies, is reſponſible for the value he bore when maimed;—but he is not reſponſible for any thing if the ſlave imed maſter) after the uſurpation.

If a maſter ſtrike off the hand of his ſlave, and a perſon then uſurp ſuch ſlave, and he die in the uſurper's poſſeſſion in conſequence of the diſmemberment, the uſurper is accountable for the value he bore after he was maimed. If, on the contrary, a perſon uſurp a ſlave, and the ſlave's maſter then ſtrike off his hand whilſt in the uſurper's poſſeſſion, and the ſlave die in conſequence, the uſurper is not reſponſible for any thing. The reaſon of the diſtinction here made is that uſurpation (as being in itſelf a cauſe of property, where a compenſation is paid by the uſurper) precludes the conſequence; and therefore, upon the uſurpation taking place between the offence and its conſequence, the letter is put out of the queſtion, (in the ſame manner as where a *ſale* intervenes between the offence and its conſequence;) whence the matter ſtands upon ſimilar ground as if, the perſon having uſurped the maimed ſlave, he [the ſlave] were afterwards to die by the viſitation of heaven;—and accordingly, the value he bore when maimed is due. In the ſecond inſtance, on the contrary, as nothing has occurred between the offence and its conſequence, to preclude the latter, that is therefore immediately referred to the diſmemberment committed by the maſter, and he is conſidered the immediate deſtroyer of the ſlave,—whence the caſe is as if he [the maſter] had taken back the ſlave from the uſurper, (as having performed an act upon him,)—and the uſurper is conſequently exempted from reſponſibility.

If an inhibited ſlave uſurp another inhibited ſlave, and ſuch ſlave die in the uſurper's hands, he [the uſurper] is reſponſible, as an inhibited ſlave is liable to be proſecuted for his acts.

One other, who dies, is reſponſible.

If a perſon uſurp a *Modabbir*, and the *Modabbir* commit an offence whilſt in the uſurper's hands, and be afterwards reſtored to his maſter, and then commit a ſecond offence, in the maſter's hands, the maſter is in that caſe accountable to the two avengers of offence for the *Modabbir*'s value, which is ſhared equally between them;—for it is out of the maſter's power to make over the offender, becauſe of his having conſtituted him a *Modabbir*; and he has therefore, by that act, annulled the right of the avengers: but as he has been guilty of this obſtruction with reſpect to *one* body only, he therefore is accountable for no more than one value. The value, moreover, is divided equally between the avengers, becauſe the caſe proceeds on the ſuppoſition of both the offences inducing the ſame penalty, and the *Modabbir* bearing the ſame value at the time of each reſpective offence. Upon the maſter, however, thus paying the value to the two avengers, he is to take one half of the value from the uſurper, as having paid the ſame on account of an offence perpetrated [by the *Modabbir* whilſt] in his poſſeſſion; and this he is to pay to the avenger of the firſt offence; after which he is again entitled to take the ſame, a ſecond time, from the uſurper. This is according to the two *Elders*. *Mohammed* ſays that the maſter is to reſume one half of the value from the uſurper, which he is to retain with himſelf, (that is, he is not to make it over to the firſt avenger;) becauſe what he thus takes from the uſurper is in lieu of what he has paid to the firſt avenger, and he therefore is not required to pay this alſo to him; for if ſo, it follows that the conſideration and the return unite in one perſon, which is unlawful; and it alſo follows that the claim is repeated, as what the maſter takes from

Caſe of a *Modabbir*, being uſurped, and committing an offence, and then, being his maſter, committing *another* offence.

from the uſurper is in lieu of what reſts with the *firſt* avenger, not in lieu of what reſts with the *ſecond*; and therefore his paying the ſame to the firſt avenger a ſecond time induces a reiteration of claim. The argument of the two *Elders* is, that the right of the firſt avenger extends to the *whole* value of the ſlave; for as, at the time of the firſt offence, no other offence had taken place, there is therefore no prevention * from the ſecond offence, the only circumſtance which could trench upon or leſſen the firſt avenger's right. The maſter, therefore, being thus poſſeſſed of ſomething in conſideration of the ſlave, unoccupied by any other claim, the firſt avenger is entitled to take it, in order to the completion of his right; and upon his ſo doing, the maſter is again to reimburſe himſelf for the ſame from the uſurper, as the firſt avenger took it from him on account of an offence committed by the *Modabbir* whilſt in the uſurper's hands.

Caſe of a *Modabbir*, firſt committing an offence with his maſter, and then, being uſurped, committing another with the uſurper.

If, on the other hand, a *Modabbir* firſt commit an offence whilſt in the poſſeſſion of his maſter, and then a perſon uſurp him, and he commit another offence whilſt in the poſſeſſion of the uſurper, the maſter is accountable to the two avengers of offence for his value, which they ſhare equally between them; and he is entitled to reimburſe himſelf for half the value from the uſurper, for the reaſons explained in the preceding example. As, however, in this inſtance, the maſter takes the half, as aforeſaid, on account of the *ſecond* offence committed in the uſurper's hands, not on account of the *firſt* offence, he is to make this over to the firſt avenger, but cannot reimburſe himſelf from the uſurper a ſecond time;—and this according to all authorities. The ground of diſtinction between this and the preceding caſe (according to *Mohammed*) is that, in the former, if the maſter were to pay that half of the value, which he takes from the uſurper, to the firſt avenger, it induces an union of the conſideration and the return in one perſon, as has been already ſtated;—whereas, in the latter, this conſequence is not induced; becauſe, as the firſt offence was committed in the maſter's hands, what he takes from the uſurper is therefore on account of the *ſecond* offence, that having been committed in the hands of the uſurper; and hence, his making over this to the firſt avenger does not induce an union of the conſideration and the return in one perſon.

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* Arab. *Mozàhimat*. The meaning is, *preventing a thing from taking its full effect.*

Caſe of a *ſlave*, ed, cc ting an offence with the uſurper, and then, being reſtored, committing another with his maſter.

If a perſon uſurp the ſlave of another, and the ſlave commit an offence whilſt in the uſurper's poſſeſſion, and the uſurper afterwards reſtore him to his maſter, and the ſlave then commit another offence whilſt in his maſter's hands, the maſter muſt reſign him to the two avengers, and is then to take an half of his value from the uſurper and make it over to the *firſt* avenger,—and is again entitled to reimburſe himſelf for ſuch half from the uſurper. (This is according to the two *Elders*. *Mohammed* maintains that he is to take the half from the uſurper, and retain it for his own uſe, without any further proceſs.) If, on the contrary, the ſlave firſt commit an offence in the hands of his maſter, and a perſon then uſurp him, and he commit an offence in that perſon's hands, his maſter muſt make him over to the two avengers, in equal ſhares; and muſt then take an half of his value from the uſurper, and pay it to the firſt avenger; but is not again to reimburſe himſelf, for this half, from the uſurper. The reaſon of this diſtinction has been already aſſigned; for there is no other difference between this, and the caſe of the *Modabbir*, than that here the maſter is to make over the ſlave,—whereas, in the other inſtance, he is to pay the value of the *Modabbir*.

Caſe of a *Modabbir*, uſurped, offending, reſtored, again uſurped (by the ſame perſon,) and

If a perſon uſurp a *Modabbir*, who commits an offence whilſt in his poſſeſſion, and he then reſtore him to his maſter, and again uſurp him, and the *Modabbir* again commit another offence in his poſſeſſion,—the maſter is in this caſe to pay his value to the two avengers, in equal ſhares;—for as the maſter, in having conſtituted his ſlave a *Modabbir*, counteracts the regulation [of reſigning him] only with reſpect to the ſingle individual, he is therefore accountable only for one payment of his value. But he is then entitled at the ſame time to take ſuch value from the uſurper, as both the offences were committed in his hands;—after which he is to pay an half of ſuch value to the firſt avenger; becauſe the firſt avenger is entitled to a complete value, ſince at the time of the firſt offence no other offence had taken place, ſo as to interfere or prevent this; and his right is not leſſened by any *ſubſequent* prevention; and therefore, where he finds an half of the value of the ſlave in the maſter's hands, unoccupied by any other claim, he is entitled to poſſeſs himſelf of it;—and the maſter is again to reimburſe himſelf for this from the uſurper, (the firſt avenger having taken it from him on account of an offence committed in his [the uſurper's] hands) and to retain what he thus recovers for himſelf; for he is not required to pay it to the firſt avenger, as *he* has already received his full right,—nor to the *ſecond*, as he never was entitled to more than the *half* value, becauſe of the priority of right of the firſt avenger, and has already received all he could claim.

A perſon … an … e- … if he die in his hands by any

If any perſon uſurp a free-born infant, (that is, take him away, without the conſent of his guardian,) and the infant die, either ſuddenly, or of any diſorder (ſuch as a *fever* for inſtance,) the uſurper is not reſponſible,—whereas, if he die by a ſtroke of lightning, or the [illegible] of a ſnake, the uſurper's *Akilas* are accountable for the complete fine. This proceeds upon a favourable conſtruction. Analogy would ſuggeſt that there is no reſponſibility in either inſtance, (and ſuch is the opinion of *Ziffer* and *Shafeï*,) becauſe uſurpation connot be eſtabliſhed with reſpect to a freeman, inſomuch that if the infant uſurped be a *Mokâtib*, ſtill the uſurper is not accountable for any thing, notwithſtanding a *Mokâtib* be free with reſpect to *poſſeſſion* only*; and as the infant in queſtion is free in point both of *poſſeſſion* and *perſon*, reſponſibility for him is not incurred *a fortiori*. The reaſon, however, for a more favourable conſtruction, in this inſtance, is that although the uſurper be not reſponſible on account of the *uſurpation*, yet he is ſo on account of the *deſtruction*, as that is referred to him, he having taken the infant to the place where the ſnake was, or the lightning fell; for thoſe are not to be met with in *every* place; and conſequently, in taking the infant thither he was guilty of a tranſgreſſion, and rendered fruitleſs the care of the guardian. The death of the infant is therefore, in this inſtance, referred to the uſurper, in the ſame manner as in the caſe of digging a well; and this (as in that inſtance) is *homicide by an intermediate cauſe*. It is otherwiſe where the infant dies ſuddenly, or of ſome diſeaſe; for in this there is no difference from a difference of place. If, however, the uſurper carry the infant to a particularly unhealthy ſpot, and the infant die of any diſorder contracted there, the *Akilas* are accountable for the fine, as the death, in this inſtance, bears the conſtruction of homicide.

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* A *Mokâtib* differs from an abſolute ſlave, in this particular (among others,) that he is capable of holding property in his own right.

An infant [illegible] the [illegible] of the depoſit, but not for the *conſumption* of it.

IF a perſon place his ſlave in depoſit with an infant, and the infant kill ſuch ſlave, his *Akilas* are accountable for the fine, (that is, the value of the ſlave;) whereas, if a perſon place a quantity of wheat (for inſtance) in depoſit with an infant, and the infant conſume ſuch wheat, he is no way reſponſible. This is according to *Haneefa* and *Mohammed*. *Aboo Yooſaf* and *Shafeï* allege that the infant is equally reſponſible in either caſe. In the ſame manner, if a perſon place a quantity of wheat in depoſit with an inhibited ſlave, and the ſlave conſume the ſame, he is not then immediately reſponſible, according to *Haneefa* and *Mohammed*, but is liable to account for it after he ſhall have obtained his freedom; whereas, according to *Aboo Yooſaf* and *Shafeï*, he is then accountable. The ſame difference of opinion alſo prevails between thoſe doctors where a perſon *lends* any article, or money, to a ſlave or an infant, and the ſlave or infant deſtroy the ſame. The argument of *Aboo Yooſaf* and *Shafeï* is that the infant has deſtroyed the property of another without his conſent; and as this property is valuable, and protected on behalf of the owner, the deſtroyer is therefore reſponſible for it,—in the ſame manner as where a perſon places his ſlave in depoſit with an infant, or where a ſtranger deſtroys property placed in depoſit with an infant. The argument of *Haneefa* and *Mohammed* is that as the infant has deſtroyed a property which was not in protection, he therefore is not reſponſible, any more than if he had deſtroyed it with conſent of the owner;—and the property is not in protection, in the preſent inſtance; becauſe the protection of property is eſtabliſhed on behalf of the owner of it. As, alſo, the owner in queſtion has placed his property with a perſon incapable of protecting it, and we are forbidden, by the LAW, to place our property in depoſit with ſuch, he [the depoſitor] is not entitled to look for an attention to his intereſt unleſs he depute ſome perſon as his ſubſtitute to take care of it; and in the preſent inſtance he has not done ſo, ſince his making the infant his ſubſtitute is invalid, he having no authority over the infant, nor the infant over himſelf. It is otherwiſe with an adult, or a licenſed ſlave; for they have a power over themſelves. It is alſo otherwiſe where a ſlave is placed in depoſit with an infant, and the infant kills ſuch ſlave; for the protection of a ſlave is founded on his natural right, a ſlave being in his original ſtate of freedom with reſpect to his blood. It is likewiſe different where a ſtranger deſtroys property placed in depoſit with an infant; for here the proprietor has remitted the protection of the property in reference to the but not in reference to any *other* perſon.

An infant or ſlave is reſponſible for the deſtruction of any property not *lent* or *entruſted* to them.

IF an infant or inhibited ſlave deſtroy the property of any perſon, the reſponſibility reſts upon the deſtroyer, provided the owner have not either lent ſuch property to them, or depoſited it with them in truſt; becauſe infants and inhibited ſlaves are liable to perſecution for their acts, although their will be of no account,—no regard being paid to this circumſtance in any matter affecting the rights of the individual.

## CHAP. VI.

## Of *Kiſſàmit*, or the Adminiſtration of Oaths.

Upon a

fifty exculpatory oaths are adminiſtered to the people of

WHERE a perſon is found ſlain in any diſtrict [*], and it is not known who was the murderer, and his heir demands a ſatisfaction for his blood from the inhabitants of the diſtrict, or from any number of them not ſpecifically named, fifty of the inhabitants, ſelected by the heir, muſt be put to their oaths, and depoſe to this effect,—" by " GOD I did not kill him, nor do I know his murderer."—*Shafeï* maintains that if there be any ſtain [†] upon the place, the heirs of the ſlain muſt make fifty depoſitions, to this effect, that " the people of " ſuch a diſtrict have ſlain ſuch an one, their relation,"—after which a decree is granted againſt the defendants, awarding a fine to the plaintiffs, [the heirs of the ſlain,] whether they claim for *wilful* murder, or for homicide by miſadventure.—(*Málik* holds that if the claim be for wilful murder, retaliation is to be decreed [‡]; and there is alſo one opinion recorded from *Shafeï* to the ſame effect.)—By the " ſtain [*Làwis*] upon the place," as mentioned above, is to be underſtood (according to the expoſition of *Málik* and *Shafeï*) any ſigns of murder being found upon a particular perſon, ſuch as a *bloody ſcymiter*, for inſtance,—or, apparent circumſtances teſtifying for the plaintiffs, ſuch as a notorious enmity having ſubſiſted between the inhabitants [or any individuals of them] and the deceaſed,—or, one juſt perſon (or a number of uncertain character) bearing teſtimony that "the "people of ſuch a place have ſlain this perſon."—If, therefore, there be neither any tokens of murder, nor any apparent circumſtances teſtifying to it, the opinion of *Málik* accords with that of our doctors,—with this difference only, that where the inhabitants of the place do not amount to fifty in number, according to *Málik* the oaths are not repeatedly adminiſtered ſo as to make them amount to fifty, but thoſe given are rejected;—whereas, according to our doctors, it is lawful to repeat the oaths until the whole fifty be complete;—and again, according to *Málik*, if the people of the place make oath, as required, they are not ſubject to a fine,—whereas, according to our doctors, they are ſubject. One argument adduced by *Shafeï*, in ſupport of his opinion, that "if there be any ſtain upon the place, the "oaths muſt firſt be adminiſtered to the heir of the ſlain," is a tradition of the prophet;—for it is related, that upon the body of a murdered *Muſſulman* being found in the well of *Kheebir* *, and [the relations of the deceaſed] carrying the matter before the prophet, he directed that fifty of the people of the well ſhould be ſworn, and the plaintiffs objecting to this becauſe of thoſe being infidels, he ſaid "*Fifty of ye muſt ſwear that thoſe people have murdered him*,"—to which they replied, "*How ſhall we ſwear to that which is unknown* "*to us?*"—Another argument is, that an oath is required, firſt, from the perſon in whoſe behalf apparent circumſtances bear teſtimony, (whence it is that the oath is firſt tendered to the poſſeſſor *;) and therefore, where apparent circumſtances teſtify for the plaintiffs, they are firſt ſworn. According to *Shafeï*, moreover, it is lawful to adminiſter an oath to the plaintiff, as holds in caſes where the defendant refuſes to ſwear. As, however, the teſtimony of *apparent circumſtances* merely is attended with ſome degree of doubt, and retaliation is remitted by the exiſtence of a doubt, but not property, a fine is therefore due from the defendants. The argument of our doctors is, that the prophet has ſaid, "*It is the part of the plaintiff* "*to produce evidence, and of the defendant to ſwear.*" It is, moreover, related by *Ibn Mooſeyib*, that a dead body having been found among the *Jews*, the prophet began by ſwearing them, and then decreed them to pay the fine,—which affords an argument that the oath is incumbent on the perſon liable to the fine. With reſpect to the tradition quoted by *Shafeï*, concerning the people of the well of *Kheebir*, the ſaying of the prophet, in that inſtance, is explained in an *interrogatory* ſenſe, as if he had ſaid to the plaintiffs "*Will fifty of* "*you ſwear?*"—This tradition is alſo related with ſome variation; for ſeveral authorities ſtate it that the prophet firſt aſked the plaintiffs "if they could produce evidence?"—to which they replied, "*if* "*there had been any witneſſes the murder would not have happened;*" —when the prophet ſaid to them, "*Let the* JEWS *ſwear to this* "*effect,—that they did not murder the man, nor do they know the mur-* "*derer;*"—and therefore the one account runs counter to the other. In reply, moreover, to what *Málik* has advanced, it is obſerved that ſwearing is proof ſufficient to *repel* but not to *eſtabliſh* a claim,—inſomuch that a perſon does not, by mere ſwearing, obtain a title even to *property*, although that be (comparatively) inſignificant, and conſequently cannot obtain a title to life [by retaliation] *a fortiori*. It is to be obſerved that the heirs have it in their option to appoint any ſifty individuals [*], becauſe the oath required is their right, and it is moſt likely that they will fix upon ſuch as are ſuſpected of the murder, or upon perſons of known probity among the inhabitants, (thoſe being the moſt cautious of ſwearing falſely,) by which means the murderer may be diſcovered; for the advantage propoſed in ſwearing is the diſcovery occaſioned by a *refuſal* to ſwear; and therefore the upright among the inhabitants, admitting that they themſelves were not concerned in the murder, ſtill will not fail to diſcover the murderer if they know him. If, alſo, the heirs fix upon a *blind* perſon among the inhabitants, or perſons who have ſuffered puniſhment for ſlander, to ſwear, it is approved, becauſe the depoſitions of ſuch are inadmiſſible only where they appear as *witneſſes*; but here they are brought forward merely to *ſwear*, not as *witneſſes*.

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[*] Arab. *Mahla.*—It ſignifies, in its general acceptation, any place of reſidence whatever.—In matters of law, revenue, &c. it is uſed to expreſs a diſtrict of the ſmalleſt claſs, ſuch as the ward or quarter of a city, a pariſh, &c.

[†] The meaning of this will be explained a little further on.

[‡] This can only mean where the depoſitions of the heirs point at ſome particular perſon, (ſuch as one upon whom any thing is found to induce ſuſpicion,) for it is ſcarcely poſſible that he ſhould argue for retaliation, either upon the *whole diſtrict*, or upon any individual unſpecified. The arrangement of this paſſage is ſomewhat obſcure both in the the *Perſian* verſion.

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* *Kheebir* (alſo pronounced *Khäiabar*) is a city of *Arabia*, ſituated in the province of NAJD, about two hundred and fifty miles north-eaſt of *Medina*, inhabited (as appears from the context) chiefly by *Jews*. It is probable that *Kaleebal Kheebir* (the well of *Kheebir*) is the proper name of ſome place in the neighbourhood.

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* Alluding to diſputes concerning *property*.

and the fine of blood is then impoſed on them.

Upon the people of the diſtrict ſwearing, as above, a decree is paſſed awarding them to pay the fine for the ſlain; and an oath is adminiſtered to the heirs. *Shafeï* maintains that the fine is not impoſed in this inſtance; becauſe of a determination of the prophet, who exempted certain *Jews* from a fine upon their taking the oath; and alſo, becauſe the oath has been ordained by the LAW for the purpoſe of exculpating the defendant, and not with a view to ſubject him to any puniſhment. The argument of our doctors is, that the prophet uſed to impoſe the fine as well as the oath, as appears from the traditions of *Abdoola Ibn Saheel*, with which *Shafeï* was not acquainted.—*Omar* alſo did the ſame. *Kiſſamit*, moreover, was not inſtituted for the purpoſe of eſtabliſhing a fine where the parties refuſe to ſwear, but for the purpoſe merely of diſcovering whether it be not a caſe of retaliation, by compelling the murderer to an acknowledgment, from his fear of taking a falſe oath. Upon the people of the diſtrict, therefore, taking the oath, retaliation being put out of the queſtion, the fine is conſequently due from them, either becauſe of their having been guilty of a neglect, (as in caſes of homicide by miſadventure,)—or, becauſe it is evident that they muſt have ſlain the perſon, his body being found among them;—not becauſe of their *refuſing to ſwear*.

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[*] Of the diſtrict, for the purpoſe of being ſworn.

If any one of muſt be impriſoned.

IF, among the people of the place ſelected to ſwear, any one refuſe to take the oaths, he is to be impriſoned until he take it*; becauſe the oath, in *Kiſſâmit*, is eſſential and indiſpenſable, blood being a matter of weight, and not of ſlight conſideration. It is otherwiſe where a perſon refuſes to ſwear in a matter of *property*; for the oath, in matters of property, is a ſubſtitute in lieu of the article claimed by the plaintiff†, and accordingly, the ſwearing is remitted by the ſurrender of the article claimed; but in the caſe of *Kiſſâmit* the ſwearing is not remitted by a payment of the fine. It is to be obſerved that what is here advanced applies, not only to where the heir of the ſlain lays his claim againſt the *whole* of the inhabitants of the diſtrict, but alſo, to where he advances it againſt any number of them not ſpecifically named; for as thoſe cannot be diſtinguiſhed from the reſt, the caſe is therefore as if the claim comprehended the whole. A claim laid on the ground of wilful murder is alſo the ſame as on homicide by miſadventure. With reſpect to a caſe of claim advanced againſt ſpecific individuals, it ſhall (GOD willing) be treated of in its proper place.

If the whole number of them be not fifty, the oat muſt be ad-

IF the inhabitants of the place or diſtrict do not amount to fifty in number, the oath muſt be adminiſtered to them repeatedly, ſo as to make up the complete number of fifty depoſitions;—becauſe it is recorded of *Omar* that (on a certain occaſion) when he ordered a *Kiſſâ-*

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* That is, "until he either take it, *or acknowledge himſelf guilty of the*

† This is a law phraſe.—The meaning of it is that, if the claimant cannot produce evidence, the oath of the defendant muſt be conſidered as all that can be expected of him, and acquits him of every demand.

until that number of depoſitions be obtained.

*mit*, forty-nine men only having taken the oath, he adminiſtered it to one of them a ſecond time, ſo as to complete the number of fifty; and then decreed the fine;—and alſo, becauſe, fifty depoſitions being requiſite upon the authority of the tradition concerning the prophet's determination in this point, the completion of the number, in the utmoſt poſſible degree, is therefore requiſite;—and it is, moreover, attended with this advantage, that it aſcertains the weight and importance of blood. It is to be obſerved, however, that if there be fifty inhabitants of the place or diſtrict, the heir cannot inſiſt upon any of them being repeatedly ſworn; becauſe the repetition of the oath is admitted purely from neceſſity, which does not here exiſt.

It is not required of an *infant* or *idiot*:

THE oath [required in *Kiſſâmit*] is not incumbent on an infant or an idiot; for an oath is in the nature of a *declaration*, not of an *act*; and the declarations of ſuch are not regarded. In the ſame manner, it is not incumbent on a woman or a ſlave; becauſe thoſe cannot be conſidered as aiders and confederates of the murderer; and of ſuch alone is it required.

nor, where a corpſe is found without marks of violence upon it.

IF a corpſe be found without marks of violence upon it, the oath is not required, nor is any fine impoſed on the diſtrict; for it is here evident that the perſon was not murdered; becauſe this deſcription is applicable only to one who dies in conſequence of ſome act of violence ſuſtained from another; but the perſon in queſtion appears to have died naturally, and not in conſequence of any violence. Fine, moreover, is incurred by the overt act of the individual; and the oath is impoſed from a ſuſpicion of murder; and hence it is indiſpenſable that there be ſome marks upon the body ſufficient to evince a murder,—ſuch as a wound, a bruiſe, or ſigns of ſtrangling,—or a hemorrhage from the eyes or ears, as that cannot be occaſioned but by ſome violence. It is otherwiſe where the hemorrhage proceeds from the mouth, the anus, or the yard; as this may appear without any act of violence.

Rules to be obſerved where only a *part* of a body is found.

If either the whole body of the ſlain be found, or the greater part of it, or the upper half of it, with or without the head, the oath is adminiſtered to the people of the diſtrict, and the fine is impoſed on them. If, on the contrary, the *lower* half only, of the body, be found, or any part of the trunk ſhort of the half, with or without the head, or the hand, foot, or head alone, nothing whatever is impoſed on them. The reaſon of this is, that the law here treated of is founded on the word of God, which expreſsly mentions the term "body." Now the greater part [of the body] is made ſubject to the rule of the whole, out of reverence to man; and accordingly, any principal portion of it is accounted the ſame as the whole in effect; but it is not ſo with any inconſiderable portion, as that is neither the whole body, nor can it be virtually accounted ſuch; whence, in ſuch a caſe, the oath is not required. Beſides, if any inconſiderable portion of the body were accounted ſubject to the ſame rule with the whole, ſo as to require ſwearing and a fine, it might, in ſome inſtances, induce the conſequence of two ſwearings and two fines on account of one body, which would be unlawful. In ſhort, it is a rule, where any part of a human body is found, that if the remainder, ſuppoſing it afterwards to be diſcovered, be ſuch as would require ſwearing and a fine, thoſe are not required on account of ſuch part; and *vice verſa*; for the reaſons already aſſigned.

The body of an infant being found

thing, unleſs there

If a new-born infant be found in any place, and there be no marks of violence upon it, the people of the place are not liable to any thing*; for as, if the body of an adult be found without marks of violence nothing is required, ſo likewiſe in the caſe of the infant *a fortiori*. If, on the contrary, there be marks of violence upon the infant's body, and it appear to have been completely formed, the oath is adminiſtered and the fine impoſed upon the people of the place; becauſe it is moſt probable, where the infant is completely formed, that it was born alive. But if it be not completely formed, nothing whatever is required, notwithſtanding it have marks of violence; becauſe it is moſt probable that ſuch an infant could not have been born alive.

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* That is, they are not liable either to have the oath impoſed or a fine levied upon them.

A perſon being found ſlain upon an animal, the oath is adminiſtered to the [illegible] and [illegible]'as pay [illegible] fine;

If a perſon be found ſlain, upon a quadruped, which another perſon is driving, the oath is adminiſtered to the driver, and his *Akilas* are reſponſible for the fine; becauſe in this the people of the place have no concern; for as the body is found in the hands of the driver, the caſe is therefore the ſame as if it were found in his houſe. The ſame rule alſo holds where the perſon in queſtion ſits upon the animal [holding the body] and another leads it. If, alſo there be *three* perſons engaged about the animal, one riding, another leading, and a third driving it, they are all ſworn, and the fine is impoſed on their *Akilas*; for as the body is found in their hands, the caſe is therefore the ſame as if it were found in their joint houſe, or tenement,—in which inſtance they would be required to ſwear, and their *Akilas* would be accountable for the fine.

or, if there be no driver, [illegible] oath is [illegible] [illegible]ed [illegible] [illegible]e levied upon the neareſt inhabited

If a perſon be found ſlain, upon an animal, moving along between two villages, the oath is adminiſtered and the fine impoſed upon the inhabitants of the neareſt of thoſe villages; becauſe it is recorded that, in the time of the PROPHET, a perſon having been found ſlain between two villages, the PROPHET directed the diſtances to be meaſured, and impoſed the oath and fine upon the inhabitants of the neareſt; and he alſo, on a particular occaſion, wrote to *Omar* to the ſame effect. It is to be obſerved, however, that if both the villages be ſo near the ſpot as to admit of a man's voice being heard from it, they are both equally liable to the oath and fine; becauſe, where ſuch is the caſe, it was in the power of the people of both to have come to the deceaſed's aſſiſtance, which they neglected to do.

dead body being found

If a perſon be found ſlain in any man's dwelling-houſe, the oath is impoſed on the maſter of the houſe, as it is in his poſſeſſion;—and the fine is impoſed on his *Akilas*, as they are his aiders and coad-

the fine.

The *proprietors* of a place are ſworn in ſuch caſes, not the *renters*.

IF a perſon be found ſlain in any place, the people of which are of two different deſcriptions, ſome of them being the proprietors, and others merely reſidents upon rent or loan, the oath is adminiſtered to the former, not to the latter, according to *Haneefa* and *Mohammed*. *Aboo Yooſaf* ſays that it is adminiſtered to all indiſcriminately, as all are alike reſponſible; for do we not ſee that the prophet directed the oath to be adminiſtered to the *Jews*, who were merely *reſidents* at *Kheebir*?—To this, however, *Haneefa* and *Mohammed* reply that the preſervation of the peace, in any place, reſts more immediately upon the proprietors, not upon thoſe who are merely tenants, becauſe the reſidence of the former is continual, and not liable to interruption; and hence they in particular are reſponſible, as the neglect is attributed to them. With reſpect to the *Jews* at *Kheebir*, they were, in reality, *proprietors* of the place, as the prophet reſtored them to their poſſeſſions there, and impoſed a tribute upon their lands.

*Recent* reſidents are ſworn, but the fine is levied on the *original* reſidents only.

IF there be two deſcriptions of reſidents in a place, ſome being *original* proprietors, and others *recent* proprietors, and a perſon be found ſlain there, the oath is adminiſtered to the whole indiſcriminately, but the fine is impoſed ſolely on the *original* proprietors, although this ſhould be only a ſingle perſon. *Aboo Yooſaf* ſays that the fine, as well as the oath, is impoſed on the whole; for it is impoſed ſolely on account of a neglect in the preſervation of the peace; and all are alike to blame in this particular, as the power to preſerve the

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* The ſtatement of this caſe, by which the *Akilas* are exempted from taking the oath, proceeds upon the ſuppoſition of their not being on the ſpot at the time;—for if they be preſent the oath is alſo adminiſtered to them,—as will appear a little farther on. The ſame rule applies to the driver of an animal, upon which a dead body is found, as before

peace depends upon the property people have in the place; with reſpect to which all the proprietors are on an equal footing. The arguments of *Haneefa* and *Mohammed* on this point are twofold.—First, the original proprietors are the more immediate guardians of the place, as is univerſally admitted.—Secondly, the original proprietors are the old eſtabliſhed reſidents, whereas the more recent proprietors are merely new comers, and the power of regulation and of preſerving the peace therefore particularly belong to the former.—(Some ſay that this doctrine of *Haneefa* is founded on what he ſaw of the people of *Koofa*; for there the *original* proprietors had the guard of places, not the *recent* proprietors.)

If there be none of the original proprietors concerned in the place, having entirely parted with it by ſale or otherwiſe, the oath and fine are impoſed on the purchaſers, or other preſent poſſeſſors, according to all authorities.

of a perſon being found ſlain in a houſe.

If a perſon be found ſlain in any man's houſe, the oath is adminiſtered, not only to the maſter of the houſe, but alſo to his *Akilas*. Thoſe, however, are included in the ſwearing on the condition only of their being *preſent*; for if they be abſent, the oath is adminiſtered to the maſter fifty times repeatedly, ſo as to complete the number of fifty depoſitions. This is according to *Haneefa* and *Mohammed*.—*Aboo Yooſaf* ſays that the *Akilas* are not required to ſwear. The argument of *Haneefa* and *Mohammed* is that, where the *Akilas* are upon the ſpot, the regulation of the place is as much an obligation upon them as upon the immediate proprietor; and conſequently they are aſſociated with him in taking the oath.

If a perſon be found ſlain in a houſe held unequally in partnerſhip among three, one half of it (for inſtance) appertaining to *Zeyd*, a tenth of it to *Amroo*, and the remainder to *Bikker*, yet the oath is adminiſtered according to the number of the perſons, not according to the amount or value of their reſpective ſhares;—becauſe the poſſeſſor of the ſmalleſt ſhare is at liberty to obſtruct him who poſſeſſes a larger ſhare; and ſuch being the caſe, all are upon an equal footing with reſpect to the regulation of the houſe and the preſervation of the peace within it, and are conſequently alike involved in the charge of remiſſneſs.

A perſon being found ſlain in a ſold houſe, the fine is impoſed on the *Akilas* of

If a man purchaſe a houſe, and, before he takes poſſeſſion of it, a perſon be found ſlain in it, the fine is impoſed on the *Akilas* of the ſeller, whether a reſerve of option have been ſtipulated to either party in the ſale or not;—whereas, if the purchaſer firſt take poſſeſſion of the houſe, and the man be then found ſlain in it, the fine is impoſed on the purchaſer. The two diſciples maintain that if there be no option in the ſale, the fine is impoſed on the purchaſer*: but if there be a condition of option, it is impoſed on the *Akilas* of that party to whom the houſe in the end belongs †; for as the fine is impoſed ſolely on account of the neglect of circumſpection, it therefore falls only on him who poſſeſſed the power to exert ſuch circumſpection; and as this power belongs only to the proprietor, on him alone is the fine incumbent;—whence it is that, where a perſon is found ſlain in a *depoſited* houſe, the fine falls upon the *owner*, not on the *truſtee*. Where, moreover, there is an option in ſale, the purchaſer becomes the proprietor, and the fine is conſequently due from him: but where, on the contrary, there is a condition of option, the aſcertainment of the property becomes neceſſary; in other words, in whomſoever the property of the houſe is ultimately eſtabliſhed, upon him the fine falls. The argument of *Haneefa* is, that the ability of exerting circumſpection is in conſequence of actual poſſeſſion, not of mere right of property; for the perſon in immediate poſſeſſion is enabled to take a proper care, although he be not the proprietor,—whereas the proprietor, if he be not in poſſeſſion, has not this in his power. Now where a perſon ſells his houſe, ſo long as the purchaſer does not take poſſeſſion, the ſeller ſtill continues ſeized of it, whether there be a condition of option in the ſale, or not; and hence, in this caſe, the fine falls upon the *Akilas* of the ſeller. If, on the contrary, the purchaſer have taken poſſeſſion *, and there be no reſerve of option to either party, the fine evidently falls upon him. If a right of option be alſo ſtipulated to the *ſeller*, the houſe is inſured in the hands of the purchaſer, to the amount of its value; (in other words, if it be deſtroyed in his hands, he is accountable to the ſeller for the value;) in the ſame manner as holds in a caſe of uſurpation; whence regard is paid to his poſſeſſion, and he is accordingly enabled to uſe circumſpection;—or if, on the other hand, a right of option be reſerved to the *purchaſer*, he is in that caſe excluſively entitled to act with reſpect to the houſe; (in other words, he may do as he pleaſes with it, but no other perſon;)—from all which it follows that the fine falls upon the purchaſer, where he has taken poſſeſſion of the houſe.

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* Whether he have taken poſſeſſion of the houſe or not.

† To underſtand the reaſoning upon this caſe, the reader muſt refer to *conditions of option in* SALE. (See Vol. II. p. 380.)

If the real owner of the houſe be unknown, it is impoſed on the *Akilas* of the *poſſeſſor*.

If a man be found ſlain in a houſe in the poſſeſſion of any perſon, the real proprietor being unknown, the fine is not impoſed on the *Akilas* of the poſſeſſor until evidence be adduced to prove his being the proprietor, in caſe his *Akilas* ſhould diſpute, and deny his being ſo, alleging that the houſe is merely a depoſit in his hands;—becauſe the poſſeſſor's having a *property* in the houſe is an eſſential condition to his *Akilas* being liable to the fine; and although poſſeſſion be an argument of property, yet ſtill it is poſſible that this perſon may not be the proprietor. The bare circumſtance of *poſſeſſion*, therefore, does not ſuffice to ſubject to the fine, in the ſame manner as it does not ſuffice to eſtabliſh a right of *Shaffa*.

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* Previous to the body being found in the houſe.

IF a perſon be found ſlain in a ſhip or boat, the oath and fine are impoſed upon the ſailors, boatmen, or other perſons who may be on board, or are employed in tracking it up the ſide of a river, whether they be the proprietors, or otherwiſe, becauſe the veſſel is in their hands;—and the ſame rule alſo obtains with reſpect to carts, or other carriages. This perfectly accords with the doctrine of *Aboo Yooſaf*, as he holds that the oath is impoſed on the reſidents, whether they be proprietors or not. *Haneefa* and *Mohammed*, on the contrary, hold that it is impoſed on the *proprietors* only, not on thoſe who are merely *reſidents*:—but the difference they make between a houſe or place and a veſſel or carriage is, that the latter are moveable from place to place, and therefore, with reſpect to them, regard is paid to *poſſeſſion*, not to *property*, in the ſame manner as in the caſe of animals;—whereas a houſe, or place, is not moveable, and therefore, with reſpect to them, regard is paid to *property*, not to *poſſeſſion*.

A [illegible] ing [illegible] en [illegible] and fine are impoſed on thoſe in whoſe hands it is at the time.

IF a perſon be found ſlain in the moſque of a diviſion [of a city,] the oath and fine are impoſed on the inhabitants of that diviſion; becauſe the care and regulation of the moſque reſt particularly upon them. If, on the contrary, a perſon be found ſlain in the *Jàma* moſque, or in the highway, or on a bridge, the oath is not adminiſtered to any one; but the fine is paid from the public treaſury; becauſe the *Jàma* moſque, the highway, and bridges are for the uſe of the community at large, and as the property of the public treaſury alſo belongs to them, the fine is therefore payable from it.

A perſon being found ſlain in a moſque, the oath and fine are im- [illegible] that

IF

Caſe of a perſon being found ſlain in a *public market*,

If a perſon be found ſlain in a *Bazàr*[*], which is the property of any one, the oath and fine, according to *Aboo Yooſaf*, are impoſed on the inhabitants of ſuch *Bazàr*;—whereas, according to *Haneefa*, they are impoſed on the proprietor. If, on the contrary, a perſon be found ſlain in a *Bazàr* not belonging to any one in particular, (as where it is ſituated in common land,) the fine is diſburſed from the public treaſury, as the *Bazàr* in queſtion belongs to the community at large.

or a priſon.

If a perſon be found ſlain in a priſon[†], the fine for him, according to *Haneefa* and *Mohammed*, is diſburſed from the public treaſury. *Aboo Yooſaf* maintains that the oath and fine are impoſed on the priſoners, becauſe they are the inhabitants of the place, and it is evident that they ſlew the perſon. The arguments of *Haneefa* and *Mohammed* are twofold.—First, the people of the place in queſtion are in a ſtate of ſubjection, and therefore cannot be conſidered as the *coadjutors* of each other; whence they are not liable to any thing incurred under the idea of *aid* and *aſſiſtance*.—Secondly, the priſon has been conſtructed with a view to the advantage of the *Muſſulman* community; and conſequently, where this view is anſwered, the mulcts incurred in it muſt be diſburſed from the public purſe.

No inqueſt is inſtituted upon a perſon

If a perſon be found ſlain in a deſart, at a diſtance from any inhabited place, (that is, ſo far removed as that a man's voice cannot be heard from it,) his blood is of no account; becauſe, the place being at ſuch a diſtance, no neglect is imputable. This proceeds on a ſuppoſition of the deſart not being the property of any individual; for if it belong to any perſon in particular, the oath and fine are impoſed upon him and his tribe or family.—(If the deſart be ſituated between two inhabited places, the oath and fine are impoſed on the inhabitants of that which is neareſt to the ſpot, for the reaſons already aſſigned.)

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[*] This is a well known term for a ſtreet or range of ſhops, which are occaſionally built by the proprietors of lands, and let to the merchants: it is alſo a term applied to any piece of land hired out, or ſet apart, for the purpoſe of a market.

[†] Arab. *Sawk-al-Mamlook*; Perſ. *Bandee-Khàna*; literally, "*the houſe* (or place) *of ſlaves*." The term has a reference to local cuſtoms, and ſignifies (perhaps) a ſquare, court, or diviſion of a city, ſet apart for the reception and accommodation of priſoners taken in war. The tranſlator has not been able to obtain any ſatisfactory explanation of it.

found ſlain in a deſart place;

IF a perſon be found ſlain on a great river, ſuch as, the *Euphrates*, floating down with the ſtream, his blood is of no account, ſuch rivers not being in the hands of, nor particularly belonging to, any perſon. If, on the contrary, a perſon be found ſlain on the *ſhore* of a great river, and not carried down with the ſtream, the oath and fine are impoſed upon any village, on that ſide, within ſuch a diſtance as admits of a man's voice being heard from the ſpot;—and if there be two or more villages within that diſtance, they are impoſed upon the neareſt.

or floating down a river,

IF a perſon be found ſlain in a ſmall river, (that is, ſuch as the right of *Shaffa* extends over,) the oath and fine are impoſed upon the people who claim a right in ſuch river, as it is accounted to be *in their poſſeſſion*. (It is related, in ſome law books, that the oath is impoſed on the people, and the fine upon their *Akilas*.)

river be *private property*.

IF the heirs of the ſlain impeach any one of the people of the place in particular, ſtill the oath is not remitted with reſpect to the others, on a favourable conſtruction of the LAW; whereas, if the plaint be laid againſt any individual *not* one of the people of the place, thoſe are not required to ſwear. The difference between theſe two caſes is that where any one of the people of a place is accuſed in particular, all the reſt are in ſome degree implicated in the accuſation, becauſe of their want of caution in not preventing the bloodſhed; whereas, if a *ſtranger* be accuſed, they have no concern in it. Beſides, the people of

The heirs ac [illegible]

[illegible] thoſe are not required to ſwear.

of the place are liable to the fine, in conſequence of the body being found among them, on this condition, that the heirs bring their ſuit againſt *them*; but where they accuſe a ſtranger, this precludes any accuſation againſt them, whence ſuch accuſation is not afterwards attended to, nor are they liable either to the oath or the fine, becauſe of the requiſite condition not exiſting in this inſtance.

The oath and fine are im- a per- found after a riot, unleſs the heirs ac- ſons in particular.

If a body of people aſſemble in a place with arms, and afterwards diſperſe, and a perſon be found ſlain in that place, the oath and fine are impoſed on the inhabitants of the diviſion, as the ſlain is found amongſt them, and the regulation and guard of the place reſts upon them. If, however, the heirs of the deceaſed accuſe the body of people who had aſſembled, as above, or any one of them in particular, are not impoſed on the inhabitants; becauſe the accuſation, being thus laid, exempts them from any concern in the matter, and conſequently, from any obligation to take the oath. It is to be obſerved, however, that where the heirs lay their accuſation againſt the body aſſembled, or any individual of them, thoſe are not liable to any thing until the heirs produce evidence in proof of their aſſertion; becauſe a matter of *right* cannot be eſtabliſhed on the ſimple claim of the plaintiff.

Caſe of a perſon being found ſlain in a *camp*.

If a perſon be diſcovered ſlain in a camp, pitched on a plain which does not belong to any one in particular, and the body be found in a tent, the oath and fine are impoſed on the owners of the tent,—or, if *not* in a tent, they are impoſed on the owners of the tent neareſt to the ſpot.—If, on the contrary, the plain in which the camp is pitched be the property of any one, the oath and fine are impoſed on him.

There is no inqueſt upon a body found after a fight.

If a body of *Muſſulmans* and of infidels aſſemble with arms for the purpoſe of fighting, and a perſon be afterwards found ſlain among them, his blood is of no account, nor is the oath or fine impoſed on any, becauſe it is evident that the deceaſed was ſlain by an open enemy. If, on the contrary, they aſſemble with any other view, and not for the purpoſe of fighting, the ſame rules obtain as are ſet forth in the preceding example; that is, if the body be found in a tent, the oath and fine are impoſed on the owners of the tent, or, if *not* in a tent, they are impoſed on the owners of the tent neareſt to the ſpot, provided the camp was pitched on ground not belonging to any perſon;—but if otherwiſe, the owner of the ground is reſponſible.

Form of the oath, in accuſing an individual.

IF a perſon, on being required to take the oath, ſhould declare that "the deceaſed was murdered by *ſuch a perſon*," he muſt be ſworn to this effect,—"By GOD I did not kill the deceaſed, nor do "I know his murderer, *except ſuch an one*;"—becauſe it is to be apprehended that by his allegation, "*ſuch an one* committed the murder," he may mean to ſcreen himſelf from proſecution; and therefore ſuch allegation is not to be credited; but he is ſworn, as aforeſaid; in order to guard againſt the poſſibility of a mental reſervation in his oath.

The evidence of the inhabitants of the place is not admitted, either

IF two inhabitants of a place* bear evidence againſt a perſon not belonging to that place that "he murdered the deceaſed," ſtill their teſtimony is not credited, according to *Haneefa*. The two diſciples maintain that it muſt be credited; for although they ſtand within the poſſibility of becoming litigants themſelves in the matter †, yet upon the heirs laying their accuſation in another quarter, they are no longer in this predicament. Their teſtimony is therefore credited; in the ſame manner as holds in the caſe of an agent for litigation, diſmiſſed from his employment before he has proceeded in his ſuit,—whoſe evidence is credited notwithſtanding he had ſtood in a predicament to be a litigant. The argument of *Haneefa* is that the people of the place in queſtion ſtand as litigants, they being accounted the murderers*, becauſe of their remiſſneſs in preſerving the peace; whence their teſtimony is not to be admitted although they ſhould be at the time freed from litigation;—in the ſame manner as where an executor accepts of his appointment, and, after being diſcharged from his truſt, offers to give evidence,—in which caſe his teſtimony is not admitted. Our author remarks that the judgment on a great variety of caſes is determined by what is here ſtated.

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* In which a perſon is found ſlain.

† In caſe of the heirs laying their accuſation againſt that place.

or another inhabitant.

If the heirs of the ſlain lay their accuſation againſt any individual of a place, and two inhabitants of the place offer to bear teſtimony in ſupport of ſuch accuſation, it is not admitted; becauſe here they are themſelves immediately under proſecution, (as has been already obſerved,) and are deſirous to free themſelves from it, whence their evidence is liable to ſuſpicion. It is recorded from *Aboo Yooſaf* that in this caſe thoſe two are to ſwear† to this effect, "by God I did not "kill him," without adding more; becauſe [in offering to bear teſtimony as above,] they have already declared that they know the murderer.

A perſon dying of a wound received among any tribe—people of that place are accountable.

If a man be wounded among any tribe, or in any place, and it be not known who ſtruck him, and he be carried to his own houſe, or to any ſituation out of that place, and there die of his wound; in this caſe, (provided he have continued bedridden until the time of his death,) the oath and fine are impoſed on the people of the ſaid place or tribe, according to *Haneefa*. *Aboo Yooſaf* maintains, that neither the oath nor the fine are impoſed in this inſtance; becauſe the injury received in the place, or among the tribe, was not *murder*, but ſomething leſs;

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* Of the perſon found ſlain in their place or diviſion.

† Upon being called on (in common with the other people of the place) to take the oath of *Kiſſamit*.

and as the oath and fine are not impoſed in any inſtance ſhort of murder, it follows that they are not required in this inſtance, any more than where the deceaſed had not continued bedridden from the time of receiving the wound. The argument of *Haneefa* is, that upon the wounded perſon dying of the wound, it [the wound] becomes murder;—whence it is that retaliation is incurred where a perſon wilfully wounded dies of his wound, and the wounder is known.—If, moreover, the wounded perſon remain continually bedridden until death, his deceaſe is attributed to the wound: but if he ſhould have been able to riſe from his bed, it is poſſible that he may have died of ſomething elſe than the wound; and conſequently the oath and fine are not impoſed, becauſe of the doubt thus engendered.

dying in the hands of the finder.

IF a man find a perſon wounded, but ſtill having a little life in him, and carry him on his back to his own houſe, and the wounded perſon die there after a day or two, or whilſt he is carrying him thither, he is not reſponſible in the opinion of *Aboo Yooſaf*; although, in analogy with the opinion of *Haneefa*, he would be reſponſible, as the deceaſed is thus found in his hands. The arguments on both ſides have been already recited.

A perſon ſlain in his own houſe, the fine is impoſed on *Akilas*.

IF a man be found ſlain in his own houſe, the fine for him is impoſed on his *Akilas*, in behalf of his heirs, according to *Haneefa*.—*Aboo Yooſaf*, *Mohammed*, and *Ziffer*, maintain that nothing whatever is due in this inſtance; for as the houſe was in the poſſeſſion of the deceaſed at the time that he ſuſtained the injury which occaſioned his death, he is therefore conſidered as having ſlain himſelf,—whence his blood is of no account. The argument of *Haneefa* is, that *Kiſſâmit* is impoſed only on account of a perſon being found *ſlain*, not on account of a perſon being *wounded*; (whence it is that if one of the *Akilas* ſhould die between the time of the perſon being wounded, and of his deceaſe, his eſtate is not liable for any part of the fine;) and, at the time of the perſon in queſtion being found ſlain, the houſe, which had belonged to him, is become the property of his heirs, and is (in fact) in their poſſeſſion; whence his *Akilas* are accountable for the fine, as aforeſaid. It is otherwiſe in the caſe of a *Mokâtib*; for if a *Mokâtib* be found ſlain in his own houſe, the houſe ſtill remaining (virtually) in his poſſeſſion after his deceaſe, he is therefore accounted to have ſlain himſelf, and conſequently, his blood is of no account.

One of two reſidents in a houſe being found ſlain therein, the fine is impoſed on the other.

If two men reſide in one houſe, and one of them be found ſlain therein, *Aboo Yooſaf* is of opinion that the fine for him is impoſed on the other. *Mohammed*, on the contrary, maintains that the other is not ſubject to any thing; for it is as poſſible that the deceaſed ſlew himſelf as that he was ſlain by the other; and therefore the fine cannot be impoſed becauſe of the doubt. To this *Aboo Yooſaf* replies, that as it is not probable a man ſhould commit violence upon himſelf, the bare apprehenſion of ſuch a thing is therefore of no weight in this inſtance, any more than where a perſon is found ſlain in the highway, or elſewhere.

Caſe of a perſon being found ſlain in a place belonging to a

If a perſon be found ſlain in a village belonging to a woman, the oath, according to *Haneefa* and *Mohammed*, is adminiſtered to the woman fifty times repeatedly, and the fine is impoſed upon her *Akilas*, (that is, her neareſt paternal relations.)—*Aboo Yooſaf* maintains that the oath alſo is impoſed upon her *Akilas*; becauſe it is not incumbent on any to ſwear, excepting ſuch as are *coadjutors*; and as a woman is not of that deſcription, ſhe therefore ſtands in the ſame predicament with an infant, and conſequently, like an infant, cannot be required to ſwear. The argument of *Haneefa* and *Mohammed* is, that the oath is impoſed with a view to repel the ſuſpicion of murder; and as ſuch ſuſpicion exiſts with reſpect to the woman in queſtion, it is therefore incumbent on her to ſwear. Our modern lawyers remark

mark that women are not aſſociated with their *Akilas*, in paying the fine, in any except this one inſtance.

or in lands ſituated i a village

IF a perſon be found ſlain in lands belonging to any one, and ſituated near a village, and the proprietor be not an inhabitant of the village, he is reſponſible, as the regulation and guard of thoſe lands reſt upon him.

# *HEDAYA.*

## BOOK LI.

## *Of MAWÀKIL, or the LEVYING of FINES.*

of terms.

*MAWAKIL* is the plural of *Màkolá*, ſignifying a *Deyit*, or *fine of blood*; and *Akilas* are thoſe who pay the fine, which is termed *Akkil* and *Mawàkil*, becauſe it reſtrains men from ſhedding blood,—*Akkil* (among a variety of other ſenſes) meaning *reſtraint.*

The fine in- is

THE fine for *manſlaughter*, homicide by *miſadventure*, or by *an intermediate cauſe*, and (in ſhort) for every ſpecies of bloodſhed by which fine is incurred, is due from the *Akilas* of the ſlayer, as has been due from *Akilas* of the ſlayer.

been before explained;—becauſe it is recorded that *Haml Ibn Málik* had two wives, one of whom ſlew the other; and the prophet ordered the *Akilas* of the woman who killed the other to pay a fine to the heirs of the ſlain;—and alſo, becauſe the life of man is ſacred, and therefore not to be taken without penalty *. A perſon, moreover, who ſlays another by miſadventure is excuſable; (and ſo likewiſe, a perſon who commits *manſlaughter*, in conſideration of the inſtrument;) and therefore is not liable to *puniſhment*, but is rather entitled to an *alleviation*;—and as, if the whole fine were levied on *him*, it might prove utterly ruinous, (which would amount to *puniſhment*,) his *Akilas* are therefore aſſociated with him in the payment of it, in order that puniſhment may be avoided, and the penalty alleviated to him. The reaſon for involving the *Akilas* in particular is, that the ſlayer is accounted to have committed his offence by means of the ſtrength of his aiders and aſſociates; and, as thoſe are his *Akilas*, *they* therefore, as it were, are guilty of the offence in remitting their vigilance;—and, having been thus deficient in their duty, they alone are aſſociated in the fine, and not others.

The *Akilas* of a *regiſtered* perſon are thoſe who are enrolled with him;—and the fine is taken out of their *pay*, in three years.

THE *Akilas* of a man are all thoſe who are enrolled with him, provided he be an enrolled perſon; and the fine is paid [deducted] from the pay or ſubſiſtence they receive from the *Imám* in the courſe of three years. (By the *enrolled* is to be underſtood the *army*, whoſe names are entered upon the *Diván*, or public records.) *Shafeï* maintains that the fine falls upon the relations of the ſlayer; for ſuch was the rule in the time of the prophet, whoſe inſtitutes cannot lawfully be broken after having been once eſtabliſhed; and, if the fine were levied upon any others than the relations and tribe of the ſlayer, it would induce a deviation from the inſtitute of the prophet in this particular. The argument of our doctors is a tradition of *Omar*, who, upon his forming a regiſter, ordained that thoſe who were regiſtered ſhould be liable for the fines of all who were enrolled with them,—and this in the preſence of the companions, none of whom oppoſed it; whence it may be inferred that they were unanimous in their opinion upon this ſubject. With reſpect, moreover, to what *Shafeï* alleges, that, "if the fine were levied upon any others than the relations and "tribe of the ſlayer, it would induce a deviation from the inſtitutes "of the prophet in this particular,"—it may be replied that this is not a *deviation*, but rather a *confirmation* of an ordinance prevailing in the time of the prophet; for at that time the fine was levied upon the *aiders* and *aſſociates* of the party; and in thoſe days *aid* and *aſſociation* originated from a variety of cauſes, ſuch as relationſhip, clientage, and ſo forth; but in the time of *Omar* aſſociation became regarded according to regiſter; (in other words, thoſe who were enrolled together ſtood as the aſſiſtants of each other;) and hence it was that he appointed the fine to be paid by them,—nor did he reverſe any ordinance of the prophet in ſo doing. The regulation of paying the fine within three years is for this reaſon, that ſuch was the ordinance of the prophet and (after him) of *Omar*; and alſo, becauſe the troops receive their pay annually, whence if the whole fine were levied at once it would be diſtreſsful, rather than alleviating.

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* Arab.—" and therefore muſt not go for

**or altogether, if, at the end of three years, they get their whole arrear at once.**

If, after the *Kázee* decreeing a fine, the Sultan diſburſe no pay to the enrolled for three years, and then give them three years pay at once, the whole fine is at once deducted, provided the pay be on account of the years ſubſequent to the *Kázee*'s decree of fine; becauſe that is due in virtue of his decree, (as ſhall be hereafter explained;) and it is exacted in three years ſolely becauſe the pay is diſburſed only once a year; and where the pay for three years ſubſequent to the *Kázee*'s decree is iſſued at once, the whole fine is at once exacted, ſince the deſign was, that it ſhould be apportioned to the pay of three years reſpectively, which deſign is here accompliſhed. If, on the contrary, (after the *Kázee* decreeing the fine,) the Sultan pay the arrears of *antecedent* years, nothing is to be deducted therefrom, as the fine is due only in virtue of the *Kázee*'s decree.

Regulation with reſpect to the times of

WHERE a complete fine is incurred[*], one third of it is due in the *firſt* year, one third in the *ſecond* year, and the remaining third in the *third* year. Where, on the other hand, a third only of the fine is incurred[†], or leſs[‡], it is due within the year; and any thing beyond that to the amount of two thirds[§] is due in the *ſecond* year; and whatever is incurred from two thirds to any thing ſhort of the complete fine[‖] is due in the third year.

Three payment, where the *Akilas* are

ANY fine due from the *Akilas*, being the *tribe* or *family* of the ſlayer, or from the eſtate of the ſlayer (as where a father wilfully murders his ſon) is payable from the property of the *Akilas*, or of the ſlayer in three years. *Shafeï* maintains that a fine due immediately from the ſlayer is payable upon the inſtant; for, as the delay of three years is deſigned for an alleviation to the *Akilas*, it cannot therefore apply to a *wilful* caſe. The argument of our doctors is that the impoſition of a fine in compenſation for life is contrary to analogy, ſince between life and property there is no proportion:—but yet as the LAW, in fixing the delay, has declared itſelf upon this ſubject, it cannot be departed from;—and therefore the payment is *deferred*, and not *immediate*.

Where a number of perſons are concerned in

IF ten perſons ſlay one perſon by miſadventure, one tenth of the fine is due from the *Akilas* of each, reſpectively, payable in three years; for each tenth is a portion of the whole fine; and, as the *whole* accidental homicide, a proportionate part of the fine is levied from the *Akilas* of each.

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[*] As in the caſe of *homicide by miſadventure.*

[†] As in the caſe of a *ſingle cut.*

[‡] As in cutting a *finger.*

[§] As in the caſe of *two* cuts.

[‖] As in the caſe of *three* cuts.

is deferred, it follows that each portion is ſo likewiſe. It is to be obſerved that the three years are counted only from the time of the *Kázee*'s decree; for the fine is impoſed as an equivalent, or (as it were) the value of the life which has been taken; and, as *value* is rendered due only by a judicial decree, regard muſt therefore be paid to the *date* of ſuch decree;—in the ſame manner as, in the caſe of a child born to a *Magroor*, regard is paid to the value it bears at the time when the *Kázee* paſſes his decree concerning it; in other words, if a perſon purchaſe a female ſlave, and ſhe bring forth a child, and the purchaſer claim the child, and another perſon afterwards prove his right to the female ſlave,—the child is free, and the purchaſer muſt pay the value of it to the rightful owner of the mother;—in which caſe regard is paid to the value the child bears at the time of the decree; and ſo likewiſe in the preſent inſtance.

his neareſt of kin,

The *Akilas* of any perſon not enrolled or regiſtered are, his *tribe* or *family*, deſcended from one father; becauſe thoſe are his *aſſiſtants*, and in impoſing the fine regard is paid to *aſſiſtance* and *aid*.—The whole fine is divided among the *Akilas* of the offender, payable within three years; and is not to be levied upon any individual at a rate exceeding four *dirms* at one time. Our author remarks that this is mentioned in the abridgment of *Kadooree*; and that it affords an argument that if the whole fine, in the three years, be made to exceed four *dirms* to each individual, it is lawful, ſince if four *dirms* be levied *per annum*, the groſs amount in three years is twelve *dirms*. *Mohammed*, however, expreſsly mentions that no more muſt be levied upon each individual than three or four *dirms* for the three years; and that at the rate of one *dirm* only, or one and a third, each year;—and this is approved.

If the family be not equal to the diſcharge of the fine *, thoſe who ſtand the neareſt in point of affinity muſt be joined with them, according to their degree of relationſhip;—firſt the brothers; then their children; then their uncles; and then their children. With reſpect to the father, grandfather, ſons, and grandſons, ſome ſay that they are included, whilſt others maintain that they are *not* ſo. The ſame rule alſo obtains with reſpect to *regiſtered* or *enrolled* perſons: in other words, if the enrolled *Akilas* be too few, inſomuch that the ſhare of each amounts to more than four *dirms*, ſuch regiſtered tribe is aſſociated with them as is neareſt to the regiſtered tribe of the ſlayer in point of *aid*, at the time of the accident taking place; and, if that tribe be alſo inſufficient, the next neareſt tribe; and ſo of the reſt. The judgment of which tribe is neareſt to the tribe of the ſlayer is left to the determination of the *Kâzee*. This is according to our doctors. *Shafeï* maintains that each individual is liable to half a *deenar*, whether he be rich or poor; he judging of this from *Zakât*. The former is, however, the better opinion.

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* There being ſo few of them that the fine would *exceed* four *dirms* to each individual.

next

*ſubſiſtence*, in the ſame manner as upon *pay*.

If the *Akilas* be ſuch as receive ſubſiſtence*, the fine is levied upon their ſubſiſtence, within three years, at the rate of one third every year; for with reſpect to them ſubſiſtence ſtands in the place of pay†, both being diſburſed from the public treaſury. Attention, however, muſt be paid to the time and manner of the ſubſiſtence being paid:—if it occur *annually*, the third of the fine muſt be taken upon its firſt occurrence after the *Kâzee*'s decree of fine; if *half yearly*, a ſixth muſt be taken; or, if *monthly*, it muſt be taken monthly, at ſuch a rate as may amount to a third of the whole in the year. If, on the contrary, the ſubſiſtence be *monthly*, and the pay *annual*, the fine muſt be taken from the *pay*, not from the *ſubſiſtence*, as from the former it can be more eaſily deducted than from the latter, becauſe of its being the more conſiderable of the two. Public maintenance, it is to be obſerved, is of three ſorts or deſcriptions; ſubſiſtence [*Rizk*], gratuity [*Kafayat*,] and pay [*Atta*;] by the firſt of which is underſtood the allowance appointed from the public treaſury for the ſupply of immediate neceſſaries,—by the ſecond, any extraordinary allowance granted on particular occaſions,—and by the third, the annual penſion or ſtipend eſtabliſhed according to rank and ſervice.

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* Arab. *Rizk*.

† Arab. *Atta*.—The difference between thoſe is explained a little further on.

The offender pays his part of the fine at the ſame rate as his *Akilas*.

THE ſlayer, in paying the fine, is upon the ſame footing with his *Akilas*, and muſt pay his proportion in the ſame manner as any other individual; for, as it was he who actually ſhed the blood, it would be unreaſonable that he ſhould be exempted, and not the others. *Shafeï* maintains that no part of the fine falls upon the ſlayer; for, as he is exempted from the *whole* fine, (becauſe of his being excuſable, as before obſerved,) ſo is he from every part of it. Our doctors, on the other hand, argue that the reaſon of the *whole* fine not being impoſed is, leſt it ſhould prove ruinous to the ſlayer; but the ſame objection does not hold to the impoſition of a *part*. With reſpect, moreover, to what *Shafeï* urges, that "the ſlayer is exempted from the fine, "becauſe of his being *excuſable*,"—it is not admitted; for, if ſuch were the caſe, it would follow that his *Akilas*, who were altogether unconcerned in the homicide, are exempt *a fortiori*.

*Women* and *infants* are not liable to fine, either as *Akilas*,

or as *offenders*.

FINE is not impoſed on women or infants, who receive ſubſiſtence from the ſtate; becauſe ſuch was the rule obſerved by *Omar*; and alſo, becauſe fine is impoſed only on coadjutors[*], in conſequence of their neglect of precaution; and women and children are not coadjutors,—whence it is that they are exempted from capitation tax. In conformity, alſo, with this rule, if the ſlayer be a woman, or an infant, no part of the fine is incumbent upon them. It is otherwiſe with reſpect to a *man*; for upon him a part of the fine is levied in conſideration of his being one of the *Akilas*; becauſe a man comes under the deſcription of a coadjutor, whereas women or infants do not.—This (it may be obſerved) is at variance with the rule before laid down (in treating of *Kiſſamit*, or the adminiſtering of oaths in caſes of ſuppoſed bloodſhed,) where a dead body is found in the houſe of a woman; for in that inſtance our modern doctors have included the woman with her *Akilas* in the payment of the fine. That, however, is a particular exception from the general rule, as has been already remarked.

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[*] Arab. *Ahl Nooſrit*; meaning all who are in a ſtate either to *aſſiſt* or *reſtrain* their fellows, or to defend the community, make war, &c. It is a technical term, for which we have no expreſſion in our language perfectly analogous.—In the inſtitutes [Vol. II.] it is uſed to expreſs all thoſe who, being *fit to bear arms*, are liable to be called forth to ſervice.

The tants of a place are not liable to the fine for a perſon of another place, unleſs the places be in one regiſter.

The inhabitants of a particular city are not liable to pay the fine for the inhabitant of another city, where the citizens of each are regiſtered ſeparately; for fine is impoſed in conſideration of *aid* either by *enrollment* or by *vicinity*; and neither of thoſe exiſt in this inſtance;—not the *former*, becauſe the cities are ſeparately regiſtered; nor the *latter*, becauſe the fellow-citizens of the ſlayer ſtand in a nearer relation to him than the inhabitants of any *other* city.

The i

the fine of a reſident in the

All the inhabitants of a city are liable to the fine for an inhabitant of the ſuburbs or vicinity; becauſe thoſe are dependants on them, having recourſe to them for defence, and for aid in all their undertakings. Hence the inhabitants of a city muſt contribute to pay the fine of an inhabitant of the ſuburbs, in conſideration of being his neighbours and coadjutors.

In i the *Aki* gard is pa to *regiſtry*, rather than to

If a perſon be reſident in one city, but enrolled in another, his *Akilas* are thoſe with whom he is enrolled, and they muſt pay his fines, not his townſmen, the former being his coadjutors, not the latter. In ſhort, aid by regiſter is of a forcible nature,—whereas aid by reſidence, family, relationſhip, patronage, or manumiſſion, is of a weak a weak nature; and no attention is paid to the weaker during the exiſtence of the ſtronger. It is to be obſerved that, next in order after aid by *regiſter*, regard is had to aid by *family* and *relationſhip*; and this is a ground upon which are built a variety of caſes.

The inhabitants of a city

dent from the deſart;

If an inhabitant of a city commit a fineable offence, and he have [illegible] appointed to him in the public regiſter, and the inhabitants of the deſart * be more nearly related to him than thoſe of the city, ſtill his fine muſt be paid by the enrolled inhabitants of the city. Some have alleged that the enrolled citizens are to pay his fine, although there ſhould exiſt no relationſhip whatever between them; becauſe the enrolled give aid to all the inhabitants of a place indifferently, and do not confine it to thoſe who are in pay. Others, again, ſay that this relationſhip is a neceſſary condition to paying the fine, as appears from the ſtatement of the caſe, which ſays, "and the inhabitants of "the plain be more nearly related to him than thoſe of the city,"—ſince from this it is to be inferred, that the inhabitants of the city *are* related to him, but in a more diſtant degree. The fine, moreover, in this inſtance, is impoſed in virtue of relationſhip; but, as the inhabitants of the city are more immediately connected with the offender by vicinity of reſidence, and therefore better qualified to afford him aid, the fine is levied on them;—in the ſame manner as where an infant has two guardians, one connected with him in a nearer and the other in a more diſtant degree; in which caſe the right of contracting the infant in marriage appertains to the neareſt of the two;—but, if he be abſent, the right then devolves to the other who is preſent, as being beſt qualified;—and ſo here likewiſe.

but not un- he have

If an inhabitant of the deſart come into a city, but have no dwelling place there, the enrolled citizens are not liable for a fine incurred by him, as they are not ſuppoſed to *aid* any but *reſidents*. In the ſame manner alſo, and for the ſame reaſon, the inhabitants of the deſert are not liable for the fine incurred by a citizen who may happen to come among them.

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* Arab. *Bàdiá*, a general term for all the plains or

*ſident* there

If a *Zimmee* kill any perſon, the fine falls upon his *Akilas*, (ſtanding in the ſame relation to him as *Muſſulman Akilas*,) provided he poſſeſs known *Akilas*, who are accuſtomed to pay fines for each other; have ſubmitted to all the *Muſſulman* ordinances which form the temporal law, but more eſpecially to thoſe of a *reſtraining* nature, ſuch as puniſhment for *theft* or *ſlander*, retaliation, and fine. *Zimmees*, moreover, are the coadjutors of each other; and conſequently the *Akilas* of a *Zimmee* are liable to the fine incurred by him. If, on the contrary, he have no known *Akilas*, the fine is payable from his property, within three years from the date of the *Kázee*'s decree, (in the ſame manner as holds with reſpect to *Muſſulmans*;)—becauſe the fine is due from the ſlayer in the firſt inſtance, and cannot devolve upon his *Akilas* unleſs ſuch are to be found; and where they do not exiſt, it muſt remain due from the offender himſelf;—in the ſame manner as where one of two *Muſſulman* traders ſlays another in a foreign country; in which caſe the fine falls upon the ſlayer, as the reſidents in the *Muſſulman* territory cannot be ſubjected to it, ſince from them he could not derive aid.

*Zimmees*
(among
themſelves)
to the ſame

An infidel is not liable for the fine incurred by a *Muſſulman*, nor a *Muſſulman* for the fine incurred by an infidel; becauſe *Muſſulmans* and infidels are not conſidered as the coadjutors of each other. Infidels, therefore, pay the fines incurred by infidels,—and this, notwithſtanding any difference of ſect.—Lawyers, however, remark that where any *very eſſential* difference ſubſiſts between ſects, (ſuch as between *Jews* and *Chriſtians*,) they are not liable for the fines incurred by each other.

*Muſſulmans*
and infidels
are not liable
to pay the
fine for each
other.

If, between
offence
the de-
, the of-
fender's *Aki*-
be chang-
iſ-
ſue againſt
*as*.

If an inhabitant of *Kooſa*, having his pay appointed to him in *Kooſa*, kill a perſon, and he be after that regiſtered and have his pay appointed to him at *Baſra*, and the matter be referred to the *Kázee*, he muſt impoſe the fine upon the *Akilas* who are of *Baſra*.—*Ziffer* maintains that he muſt impoſe it upon the *Akilas* who are of *Kooſa*; (and ſuch alſo is the opinion of *Aboo Yooſaf*;) becauſe as the offence, which is the occaſion of the fine, was committed at a time when the people of *Kooſa* were the offender's *Akilas*, it is conſequently due from them, not from the people of *Baſra*; in the ſame manner as if the regiſtry of the offender in the rolls of *Baſra* had taken place ſubſequent to the *Kázee*'s decree. The argument of our doctors is that the fine is due only in conſequence of the *Kázee*'s decree, and accordingly falls upon thoſe who are the *Akilas* at the time of paſſing the decree. It is otherwiſe where the offender becomes regiſtered in *Baſra* after paſſing the decree; for then the fine falls upon thoſe who were the *Akilas* at the time of iſſuing it, namely, the people of *Kooſa*; becauſe, as it was by the decree rendered obligatory upon *them*, it cannot afterwards devolve upon others, ſince a fine cannot devolve after being once eſtabliſhed. The offender's proportion, however, is taken from his pay at *Baſra*; for his ſhare is deducted from his pay, which he then receives at *Baſra*.

Objection.—If, after the decree, a diminution were to take place in the number of the *Akilas*, thoſe would be aſſociated with them who are neareſt in point of connexion, notwithſtanding this be a devolution of the fine, from the *Akilas*, as they ſtood at the time of the decree, upon others.—Now, if the caſe be as here ſtated, how can ſuch a devolution take place?

Reply.—The aſſociating of others, as here mentioned, is a *confirmation* of the decree, not an *annulment* of it; for in conſequence of ſuch aſſociation the number of thoſe who are to pay the fine impoſed by the decree is increaſed. It is otherwiſe in the caſe in queſtion; for there the devolution would amount to an annulment of the decree.

—Accordingly, if the reſidence of the ſlayer be at *Koofa*, and he have no pay appointed to him, and he take up his reſidence at *Baſra* before the *Kázee*'s decree of fine has iſſued, the *Kázee* muſt in that caſe decree it to be paid by the people of *Baſra* ;—whereas, if he had taken up his reſidence in that place ſubſequent to the decree having iſſued, the decree would not revert. In the ſame manner alſo, if an inhabitant of the deſert commit homicide, and the ſovereign afterwards appoint him pay in any particular regiſter previous to the *Kázee*'s decree of fine, the *Kázee* muſt decree the fine upon thoſe with whom he is regiſtered ;—whereas, if the regiſtry took place ſubſequent to a decree paſſed by the *Kázee* againſt his *Akilas* of the deſert, the decree could not revert. This is contrary to where one of the inhabitants of the deſert, to whom no pay has been appointed, commits homicide by miſadventure ; and the *Kázee* iſſues a decree of fine, to be paid from their property in three years ; and afterwards the ſovereign takes them into his army and appoints them pay ;—for in this caſe they are to account for the fine out of their *pay*, notwithſtanding the decree had ordained it out of their *property* ; becauſe here the decree is not, in fact, annulled, ſince their pay is alſo their *property*, and the payment from that is more eaſily effected than from their other poſſeſſions.

to

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THE *Akilas* of an emancipated ſlave are the family and kindred of his emancipator, they being conſidered as his *aiders* and *aſſiſtants* ;—and in the ſame manner, the *Akilas* of a client under a contract of *Mawàlat* * are his patron †, and the kindred of his patron, as thoſe are his aſſiſtants.

of

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emancipa-
tor's or pa-
tron's famil

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* See Vol. III. p. 448.—The client under a contract of *Mawàlat* is, generally, a proſelyte, adopted by the perſon to whom he owes his converſion to the faith ; and the law thus provides him *Akilas*, as he ſtands unconnected with the *Muſſulman* community otherwiſe than by the contract of *Mawàlat*.

† The perſon who has adopted him.

The *Akilas* are not liable, where the fine is ſhort

Any fine ſhort of the twentieth part of the *deyit*, or *complete* fine, is not due from the *Akilas*; but a twentieth, or any proportion above that, falls upon them;—for *Ibn Abbas* has recorded a ſaying of prophet, "Akilas *are not to pay a fine for wilful murder, nor any "thing incurred by the offence of a ſlave, or in conſequence of a compo-"ſition, or by the acknowledgment of the offender, or* (in ſhort) *any "thing leſs than the mulct for a cut*;"—and the mulct for a cut is a twentieth of the *deyit*, or complete fine. Beſides, the fine is impoſed upon the *Akilas*, for this reaſon among others, leſt the payment of it might prove ruinous to the offender himſelf; which, however, is not to be apprehended from any thing ſhort of a twentieth of the whole, as that is, comparatively, but a ſmall matter, and therefore not likely to prove eſſentially injurious to him.—(The limitation, in this particular, to a twentieth, is upon the authority of the Koran.) What is here mentioned applies ſolely to the fine for offences ſhort of *life*;—for where *life* is concerned, the *Akilas* muſt pay the fine, notwithſtanding it fall ſhort of a twentieth of the *complete* fine;—as where, for inſtance, a perſon kills a ſlave, whoſe value is leſs than a twentieth of the *complete* fine; in which caſe the murderer's *Akilas* are liable for the value, that being the fine for a ſlave.

it be a *cide*,

when it falls ſolely on the *offender*.

If, by any offence not affecting life, a fine be incurred ſhort of a twentieth, it is due from the property of the offender, upon a favourable conſtruction. Analogy would ſuggeſt that it is the ſame thing, in this particular, whether the fine be *more* or *leſs*; in other words, if it be *leſs* than the twentieth, ſtill it falls upon the *Akilas* in the ſame manner as if it were *more*; (and ſuch is the opinion of *Shafeï*;) or elſe nothing whatever falls upon them, whether it be *more* or *leſs*. The reaſon, however, for a more favourable conſtruction is, that the prophet decreed that the fine for an embryo in the womb ſhould be paid by the *Akilas*; and the fine for an *embryo* is a twentieth of the fine for a *man*, (as was formerly mentioned.)—Any thing, therefore, ſhort of the mulct for a cut ſtands upon the ſame footing with a matter of property, as being an equitable adjudgment, rendered obligatory by an arbitration,—in the ſame manner as a compenſation for property is rendered obligatory by appraiſement; and accordingly, it is due from the property of the offender.

Caſes in which the *Akilas* are not liable to fine.

AKILAS are not liable for any thing incurred by the offence of a ſlave, or in conſequence of a compoſition, or by the acknowledgment of the offender; becauſe of the tradition of *Ibn Abbas* above quoted; and alſo, becauſe a ſlave does not come within the deſcription of a coadjutor, nor does he receive *aid* from any one;—and acknowledgment or compoſition cannot be admitted in proof againſt the *Akilas*, the acknowledger or compounder not being poſſeſſed of any authority over them. *Akilas*, therefore, are not liable for any thing incurred by the acknowledger;—unleſs, however, they verify his acknowledgment; in which caſe they are liable for the fine, as they here admit the plea of the avengers of the offence, and ſuch admiſſion is proof againſt them.

IF a perſon make an acknowledgment of homicide by miſadventure, and the avengers of the offence neglect applying to the *Kázee* until after two years, the *Kázee* muſt then award the fine to be paid in three years from the date of his decree; for as a delay of payment for three years from the date of the decree is admitted in a caſe of homicide eſtabliſhed upon proof, it is conſequently allowed in a caſe of acknowledgment *a fortiori*.

IF the murderer and the avenger of offence coincide, and agree that "ſuch a *Kázee*, of ſuch a place, has decreed, upon the teſtimony of witneſſes, a fine againſt the *Akilas* of him [the ſlayer] reſiding in *Koofa*,"—and the *Akilas* deny this, they are not liable for any thing; becauſe each party affirming the other's aſſertion is no proof againſt them. Neither is the murderer himſelf liable for any thing;

for it appears that the fine was decreed againſt the *Akilas* ſolely on the ground of a mutual confirmation between the murderer and the avengers of blood, which confirmation is a proof againſt the *Akilas*, but not againſt the murderer himſelf. Nothing, therefore, falls upon him;—unleſs, however, he be enrolled and have pay appointed to him in the ſame regiſter with the *Akilas*; in which caſe he is to pay his proper ſhare of the fine; becauſe with reſpect to *his* ſhare of it he has made an acknowledgment againſt himſelf; and his acknowledgment, ſo far as it merely affects himſelf, muſt be admitted in proof againſt him; but with reſpect to the ſhares of the *Akilas*, he has made an acknowledgment affecting others; and an acknowledgment tending to affect others cannot be admitted.

In caſe of the murder of a ſlave, his value is due from the *Akilas* of the murderer;

If a perſon accidentally kill a ſlave, the fine, namely, the value of the ſlave, is due from the *Akilas* of the ſlayer; becauſe it is a conſideration for the *perſon*, as was before mentioned. According to an opinion of *Shafeï*, it is due from the property of the ſlayer, as being, in fact, a conſideration for *property*; whence (as he maintains,) the ſlayer is reſponſible for the ſlave's value to whatever amount. The former opinion is approved.

but they are not reſponſible for any thing incurred by an offence upon the *members* of a ſlave.

If a freeman commit an offence upon any *part* or *member* of a ſlave, the atonement for ſuch offence does not fall upon the *Akilas*; for as (according to our doctors) the members of a ſlave are a ſpecies of property, it is therefore due from the property of the offender, without affecting any others, agreeably to the arguments already ſet forth upon that head. According to an opinion of *Shafeï*, on the contrary, it is due from the *Akilas*, in the ſame manner as where a ſimilar offence is committed upon a freeman. The former opinion is approved.

If there be no *Akilas*, the fine is paid out of the treaſury.

Our doctors teach that, in a caſe where the ſlayer is deſtitute of *Akilas*, the fine is due from the public treaſury, the whole *Muſſulman* community being held to be the aiders of a perſon ſo ſituated. As, moreover, if this perſon were to die, his property would go, as an inheritance, to the public treaſury, it follows that any thing incurred by him muſt be paid therefrom.

Caſe of fine incurred by a child born ed by

The child of a woman divorced by *Láan* [aſſeveration] has, for his *Akilas*, his maternal kindred, his deſcent being eſtabliſhed from his *mother*, not from his *father* *. If, however, his maternal *Akilas* having paid the fine, his father ſhould afterwards claim or acknowledge him, his maternal *Akilas* are entitled to take, from his paternal *Akilas*, in three years from the time of the *Kázee* paſſing a decree of reimburſement in their favour, whatever they may have ſo paid; becauſe it then appears that the fine was due from the paternal *Akilas*, not from the maternal; for the father, by claiming him, falſifies himſelf, (in other words, acknowledges that he had aſſeverated falſely;) whence it is evident that the child's deſcent ſtood eſtabliſhed in the father from the beginning, his aſſeveration being rendered null by his ſubſequent falſification;—and upon its thus appearing that the maternal *Akilas* have paid what was in fact due from the paternal, the former are conſequently entitled to reimburſe themſelves from the latter, as they diſburſed the fine,—not in a *gratuitous* manner, but *per force*, in purſuance of the *Kázee*'s decree.—In the ſame manner alſo, if a *Mokátib* die, leaving property ſufficient to diſcharge his ranſom, and a ſon, a freeman, (by being born of his wife who was free,) and the ſon neglect diſcharging the ranſom until at length he happens to kill a perſon by miſadventure, and his maternal kindred pay the fine, and he then diſcharge the ranſom, they [the maternal kindred] are in that caſe entitled to recover from the father's tribe whatever they may have ſo paid;—becauſe, upon the ſon diſcharging the ranſom, he becomes connected with his father's family from the laſt inſtant of his [the father's] life, wherefore it appears that the maternal kindred have paid what was in fact due from the paternal,—not in a *gratuitous* manner, but *per force*, in purſuance of a judicial decree. In the ſame manner, alſo, if a man inſtigate a boy to ſlay any perſon, and he ſlay the perſon accordingly, and his *Akilas* pay the fine, they are afterwards entitled to recover the ſame from the *Akilas* of the inſtigator, upon the inſtigation being eſtabliſhed by proof; or, if the inſtigation be eſtabliſhed, not by *proof*, but by the acknowledgment of the inſtigator, they recover it from his property. It is to be obſerved, however, that the boy's *Akilas*, in this inſtance, take their reimburſement the inſtigator, or his *Akilas*, in three years from the time of the s paſſing a decree in their favour, this indulgence in point of time being allowed, in the payment of fines, in order that diſtreſs be avoided.

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* See Vol. I. p. 349.

Fourprimary examples, which give for determining concerning the impoſition of fine upon *A*

THE compiler of the *Hedàya* remarks that here follow a great variety of caſes and examples, ſtated by *Mohammed*, the primary of which are four.—I. Where the ſtate of the ſlayer is changed, and his *Willa* tranſferred to others by ſome ſupervenient occurrence, (ſuch as manumiſſion;) in which caſe his offence is not transferred from his former *Akilas*, whether the *Kàzee* iſſue a decree, or not.—For inſtance:—the male ſlave of ſome perſon marries the female ſlave of ſome other perſon; and her maſter emancipates her; and within ſix months thereafter ſhe brings forth a child; and this child committing manſlaughter, the fine falls upon the *Akilas* of the mother;—and the *male* ſlave's maſter afterwards emancipates him, in conſequence of which the *Willa* of the child appertains to him:—in which caſe the fine incurred by the child's offence ſtill reſts upon the mother's *Akilas*, and does not devolve upon the father's *Akilas*, whether the *Kàzee* have iſſued his decree of fine for the offence or not.—II. Where ſome unlooked for circumſtance occurs (ſuch as a claim laid to a child born of a woman divorced by *Lòan*;) in which caſe the matter is transferred from the *Akilas* on the one ſide to the *Akilas* on the other;—as has been explained in the example before ſtated. (The caſe of the *Mokàtib*, there mentioned, alſo proceeds on this ground; becauſe upon the payment of the ranſom he appears to have been free from the inſtant of his demiſe; and hence it does not reſt upon the *former* ground; for here the cauſe is altogether *unexpected*, and is therefore not merely a *ſupervenient occurrence.*)—III. Where the ſtate of the offender is not altered, but his *Akilas* changed, in this way, that his regiſtry was at *Koofa*, and was, after his offence, transferred to *Baſra*;—in which caſe regard muſt be paid to the decree of the *Kázee*; in other words, if he have decreed the fine againſt the former *Akilas*, and the *Akilas* be then changed, the matter does not devolve upon the latter *Akilas*; but if the be changed previous to the *Kázee*'s decree of fine againſt the firſt he muſt in that caſe decree it againſt the latter *Akilas*.—IV. Where the *Akilas* ſtill continue the ſame, but obtain an increaſe, (by there having been among them an *infant*, who in the interim attains to majority, or by ſome of them dying, and others of the neareſt tribe being conjoined in the fine;)—in which caſe the additional *Akilas* are aſſociated with the original *Akilas* in the payment of the fine, whether the *Kázee* have decreed a fine againſt the *Akilas*, or not,—excepting only with reſpect to ſuch part as may already have been paid by the former *Akilas*.—Whoever pays due attention to theſe four primary examples, as grounds of proceeding in this particular, will be enabled to form a judgment, and determine upon almoſt every caſe which can occur.

# *HEDAYA.*

## BOOK LII.

## Of *WASÀYÁ*, or WILLS.

Definition of the terms in wills.

*WASÀYÁ* is the plural of *Waſeeat.*—*Waſeeat* means an endowment with the property of any thing after death,—as if one perſon ſhould ſay to another, "give this article of mine, after "my death, to a particular perſon."—The thing ſo given is termed the *Mooſee bé bee*, or legacy;—the perſon who wills that it be given is denominated the *Màwſee*, or teſtator; the perſon in whoſe favour the will is made is called the *Mooſee lé boo*, or legatee;—and the perſon appointed to carry the will into execution is called the *Waſee*, or executor.

Chap. I. Of Wills that are legal, and Wills that are laudable; and of the Retractation of Wills.
Chap. II. Of the Bequeſt of a Third of the Eſtate.
Chap. III. Of Emancipation upon a Deathbed; and of Wills relative to Emancipation.
Chap. IV. Of Wills in favour of Kinſmen, and other Connections.
Chap. V. Of Uſufructuary Wills.
Chap. VI. Of Wills made by *Zimmees*.
Chap. VII. Of Executors, and their Powers.
Chap. VIII. Of Evidence with reſpect to Wills.

## CHAP. I.

## Of Wills that are legal, and Wills that are laudable; and of the Retractation of Wills.

Wills are lawful, on a favourable conſtruction. Analogy would Wills are ſuggeſt that they are unlawful; becauſe a *bequeſt* ſignifies an endowment with a thing in a way which occaſions ſuch endowment to be referred to a time when the property has become void in the proprietor, [the teſtator;]—and as an endowment with reference to a future period, (as if a perſon were to ſay to another, "I conſtitute you pro-

" prietor of this article *on the morrow*,") is unlawful, ſuppoſing, even, that the donor's property in the article ſtill continues to exiſt at that time, it follows that the ſuſpenſion of the deed to a period when the property is null and void, (as at the deceaſe of the party,) is unlawful, *a fortiori*. The reaſons, however, for a more favourable conſtruction, in this particular, are twofold.—FIRST, there is an indiſpenſible neceſſity that men ſhould have the power of making bequeſts; for MAN, from the deluſion of his hopes, is improvident, and deficient in practice; but when ſickneſs invades him he becomes alarmed, and afraid of death. At that period, therefore, he ſtands in need of compenſating for his deficiencies by means of his property; —and this in ſuch a manner, that if he ſhould die of that illneſs, his objects (namely, compenſation for his deficiencies, and merit in a future ſtate) may be obtained,—or, on the other hand, if he ſhould recover, that he may apply the ſaid property to his wants;—and as theſe objects are attainable by giving a legal validity to wills, they are therefore ordained to be lawful *.—SECONDLY, wills are declared to be lawful in the KORAN and the traditions; and all our doctors, moreover, have concurred in this opinion.

to the extent of a third of the teſtator's property;

IF a perſon make a will in favour of a ſtranger, to the amount of a third of his property, it is valid, although the heirs of the teſtator ſhould not be conſenting thereto; for it is ſo recorded in the traditions.

but not to any

A BEQUEST to any amount exceeding the third of the teſtator's property further extent,

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* In this place are ſtated an *objection* and *reply*, which the tranſlator has omitted in the text, in order to avoid an interruption of the ſubject.—*Viz.*

" OBJECTION.—If the right of property in the proprietor become extinct at his deceaſe, " how can his act of endowment be then valid?

" REPLY.—His right of property is accounted to endure at that time from neceſſity,— " in the ſame manner as holds with reſpect to executing the funeral rites, or diſcharging " the debts of the dead."

property is not valid. In proof of this the following tradition is quoted, as delivered by *Abee Vekàſs.* "In the year of the conqueſt of *Mecca,* being taken ſo extremely ill that my life was deſpaired of, the prophet of GOD came to pay me a viſit of conſolation. I told him, that, by the bleſſing of GOD, having a great eſtate, but no heirs, except one daughter, I wiſhed to know '*if I might diſpoſe of it* ALL *by* WILL.' He replied, '*No!*' and when I ſeverally interrogated him '*if I might leave* TWO THIRDS, *or* ONE HALF;' he alſo replied in the negative;—but when I aſked *if I might leave* A THIRD, he anſwered, *Yes, you may leave* A THIRD *of your property by will: but a third part, to be diſpoſed of by will, is a great portion; and it is better you ſhould leave your heirs rich, than in a ſtate of poverty, which might oblige them to beg of others.*"—Beſides, the right of the teſtator's heirs is connected with his property; for when he is in his laſt illneſs he has no further uſe for it; and as this is the cauſe of the title to it becoming null and void in him, and veſting in the heirs, their right therefore, at that period, becomes connected with it accordingly. This right, however, is not recognized by the LAW, with reſpect to a ſtranger, to the extent of one third of the eſtate, in order that the teſtator may be enabled, by bequeathing a third of his property out of his family, to atone for his paſt deficiencies, as before mentioned. With reſpect to the heirs *themſelves,* on the contrary, this connexion of right is recognized to the extent of the *whole* of the teſtator's property; (whence it is that if a perſon ſhould diſpoſe of a third of his property to a part of the heirs, it would not be valid;) for if no regard were paid to the connexion of their right with the whole of the property, with reſpect to themſelves, ſo as to legalize the bequeathing a third of it to a part of them, in that caſe the object of a will (namely, a compenſation for deficiencies) might not be attended to, as it is poſſible that the teſtator, inſtead of including the whole of the heirs, might leave the third only to a ſelect part of them; and this would be an injury to the others, and would conſequently induce a breach of the ties of kindred, which is unlawful. It is to be obſerved, heirs.

obſerved, however, that although a will, bequeathing more than a third of the teſtator's property, be not lawful, yet if the heirs, being arrived at the age of maturity, ſhould give their conſent to it, after the death of the teſtator, it then becomes valid; for the objection to its validity is founded merely on a regard to their right, and therefore does not operate any longer, after they themſelves agree to forego ſuch right. Their conſent, indeed, during the lifetime of the teſtator, is not regarded; for as this is an aſſent previous to the eſtabliſhment of their right, they are therefore at liberty to annul it upon the death of the teſtator. It is otherwiſe where the conſent is given *after* that event; for as this is an aſſent ſubſequent to the eſtabliſhment of their right, they are not afterwards at liberty to annul it.

A bequeſt to an heir is not

WHERE a perſon makes a will in favour of part of his heirs, the ſame rule holds as in the caſe of bequeathing more than a third to a ſtranger;—in other words, the deed is not valid, unleſs the other heirs give their conſent to the diſpoſition after the death of the teſtator; and their conſent *previous* to his death will have no effect. It is to be obſerved that, in every inſtance where a will is rendered valid by the conſent of the heirs, the legatee derives his property from the *teſtator*, not from the *heirs*. This is the opinion of our doctors. *Shafeï* maintains that he derives his property from the heirs. The opinion of our doctors is approved; for the will of the teſtator is the occaſion of the property, the conſent of the heirs being only the removal of a bar; and as the law has regard to the cauſe, not to the removal of a bar, the property is therefore derived from the teſtator, not from the heirs;—(whence it is that ſeizin is not requiſite *; for if the property were derived from the heirs, ſeizin would be requiſite; becauſe the transfer of property from a living proprietor, without receiving any thing in return, is in effect a *gift*, to the eſtabliſhment of which the ſeizin of the donee is a neceſſary condition;)—in the ſame manner as where a pawner ſells the pawn, in which caſe the ratification of the deed of ſale reſts entirely on the pawnee, and if he give his conſent, the ſale is valid, and the purchaſer derives his property in the article ſold from the *pawner*, not from the *pawnee*.

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* Meaning, "the teſtator's taking poſſeſſion of the bequeſt is not requiſite to blishment of his right in it."

A bequeſt to a per whor mortal is not valid;

If a perſon make a bequeſt in favour of another from whom he has received a mortal wound, it is not valid; whether the murderer be one of his heirs, or a ſtranger, or whether he may have wounded him wilfully or by miſadventure, provided he be the actual perpetrator of the deed; becauſe it is recorded in the traditions, that "there is no *legacy for a murderer*;" and alſo, becauſe, as the perſon who gave the wound has haſtened the death of the teſtator, he is, by way of puniſhment, excluded from the benefit of the will, in the ſame manner as a perſon under ſimilar circumſtances is excluded from inheritance.—So likewiſe, where a man, having made a bequeſt in favour of a particular perſon, is afterwards killed by that perſon, ſuch bequeſt is invalid.—If, however, in theſe caſes, the heirs ſhould give their conſent, the bequeſt then becomes valid, according to *Haneefa* and *Mohammed*.—*Aboo-Yooſuf* is of a contrary opinion; becauſe the offence of the murderer, which is the cauſe of the invalidity of the will, ſtill exiſts.—The arguments of *Haneefa* and *Mohammed* upon this point are twofold.—First, the defect in the validity of the will, *with reſpect* to the murderer, is on account of the right of the heirs; becauſe the advantage of ſuch defect reſults to them, as in the caſe of excluſion from inheritance.—Secondly, the defect in the validity of the bequeſt, as made *in favour* of the murderer, is owing to the heirs withholding their conſent, in the ſame manner as in the caſe of a will in favour of part of the heirs; and conſequently, as the conſent of the remaining heirs, in that inſtance, eſtabliſhes the validity of the will, it follows that the conſent of the heirs at large muſt have the ſame effect in the caſe in queſtion.

and if a legatee ſlay his teſtator, the beque favou

A bequeſt to a *part* of the heirs is not valid.

If a man make a bequeſt in favour of a part of his heirs, it is not valid; becauſe of a traditional ſaying of the prophet, "God *has allotted to every heir his particular right*;" and alſo, becauſe a will in favour of a part of the heirs is an injury to the reſt; and therefore, if it were deemed legal, would induce a breach of the ties of kindred.—Beſides, it is ſaid, in the traditions, "*a bequeſt to particular heirs is unjuſt.*"—It is to be obſerved that in judging whether the legatee be an heir, or otherwiſe, regard is paid to the time of the teſtator's death, not to the period of making the will; becauſe the efficacy of the will is eſtabliſhed after the death of the teſtator.—(The gift of a dying perſon* is in this reſpect of the ſame nature with a legacy, both being the ſame in effect, and is therefore executed to the amount of a third of the property.)—If, on the contrary, a dying perſon make an *acknowledgment* in favour of a part of his heirs, regard is paid to the time of ſuch acknowledgment; becauſe the acknowledgment of a dying perſon is an immediate and complete act of his own, and has not any reference to a future period;—and ſuch being the caſe, it follows that it is not valid in favour of any who were actually heirs at the time of making it,—and that it *is* valid with reſpect to ſuch as were not heirs at that time; although they ſhould become ſo afterwards;—as where, for inſtance, a perſon makes an acknowledgment in favour of his child, who is a ſlave, and the child recovers his freedom before the death of the father; in which caſe the acknowledgment ſo made is valid, notwithſtanding the child, by the recovery of his freedom, became one of his father's heirs;—for as, at the time of the acknowledgment, he was not an heir †, any acknowledgment made in his favour was virtually made in favour of his maſter, who was a ſtranger;—and the validity of the acknowledgment being once eſtabliſhed, it does not afterwards admit of being annulled from the circumſtance of the child's becoming an heir.—It is to be obſerved, however, that although a bequeſt in favour of a part of the heirs be not valid, yet it is rendered ſo by their conſent, as was already mentioned.—If, moreover, a part ſhould give their conſent, and part withhold it, the bequeſt then becomes valid in proportion to the amount of the ſhares of thoſe who conſent, and invalid in proportion to the amount of the ſhares of the others.

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* Arab. *Mareez.* Literally, *ſick*,—but always (in the language of the LAW) meaning,

† A ſlave cannot poſſeſs any right of inheritance.

Bequeſts are valid between
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The bequeſt of a *Muſſulman* in favour of a *Zimmee*, or of a *Zimmee* in favour of a *Muſſulman*, is valid: the former, becauſe God has ſaid, in the Koran, "Ye are not prohibited, O believers, from "acts of benevolence towards those who subject them-"selves to you, and refrain from battles and conten-"tions;"—and the latter, becauſe *Zimmees*, in virtue of their compact with the *Muſſulmans*, are conſidered in the ſame light with them in all temporal concerns; and as, on this principle, an intercourſe of good offices towards each other is held lawful during life, they are therefore in the ſame manner permitted to extend beyond the grave.—It is related in the *Jama Sagheer* that a will in favour of an hoſtile infidel is not valid, as God has prohibited, in the Koran, the exerciſe of benevolence towards them.

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The acceptance or rejection of a bequeſt is not eſtabliſhed until after the death of the teſtator; for as the bequeſt does not take effect before that event, thoſe cannot be previouſly regarded.—Hence the acceptance or rejection during the life of the teſtator has no effect, in the ſame manner as an acceptance declared before the exiſtence of a contract.—If, therefore, a legatee accept a bequeſt after the death of the teſtator, it is valid, notwithſtanding he may have rejected it during his lifetime.

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It is preferable and moſt adviſable not to leave legacies, if the heirs be poor, and their particular portions not ſuch as to enrich them;

where the heirs are poor.

becauſe this manifeſts benevolence to the heirs, who have a ſuperior claim to it from the relation in which they ſtand, God having declared, in the Koran, "THE EXERTIONS OF GENEROSITY TOWARDS RELATIONS IS MORE LAUDABLE THAN TOWARDS STRANGERS."—Beſides, in this an obſervance of two claims is maintained, namely, that of poverty and conſanguinity. If, on the contrary, the heirs be rich, or the particular portions aſſigned to them be ſuch as to enrich them, it is moſt adviſable to leave ſomething ſhort of a third of the eſtate in legacies, as a legacy to a ſtranger is an act of charity, whereas the beſtowal of the whole upon the heirs is a gift; and the former is more laudable than the latter, being calculated to gain the favour and good will of God. Some have ſaid that in ſuch caſe the proprietor is under no reſtraint, but is perfectly at liberty to make a will in favour of ſtrangers, or to ſuffer the whole to paſs to the heirs, as each has its particular merit, the firſt being an act of generoſity, and the ſecond an obedience to the dictates of natural affection.

The legatee is pro- of the legacy by his acceptance of it;

The property of a legatee in a legacy is eſtabliſhed by his acceptance of it. *Ziffer* is of opinion that a legacy is like an inheritance; becauſe the legatoe acquired the property by tranſition from, and ſucceſſion to, the teſtator, in the ſame manner as an heir acquires it by ſucceſſion to and deſcent from the laſt poſſeſſor; and therefore his acceptance is not neceſſary towards the eſtabliſhment of the property, in the ſame manner as holds in the caſe of inheritance.—Our doctors, on the contrary, argue that a legacy eſtabliſhes the property in the legatee *de novo*, and does not veſt by ſucceſſion and deſcent as in the caſe of inheritance;—(whence it is that a legatee cannot reject the legacy on account of any defect; in other words, if a perſon, having purchaſed a *ſlave*, for example, ſhould bequeath him to another, and the legatee, after the death of the teſtator, diſcover the ſlave to have ſome fault or defect, it would not, on this account, be in his power to return him to the ſeller, as an heir, in a ſimilar caſe, would be entitled to do;—and likewiſe, that nothing can be returned to a legatee on account of a defect; in other words, if a perſon ſhould bequeath his whole eſtate by will, and afterwards ſell ſomething belonging to it, and the buyer diſcover a defect in the ſame, ſtill he would not have the power of returning it to the legatee, whereas he might to an heir;) —and ſuch being the caſe, it reſts, therefore, entirely on his acceptance, as no perſon can be made proprietor of any thing againſt his will. Inheritance, on the contrary, is a ſucceſſion; (whence it is that the rules above mentioned have effect in it;) and an heir is therefore, as it were, *forcibly* put in poſſeſſion of his inheritance, by the eſpecial ordinance of the LAW, the validity of it not being ſuſpended on his acceptance or conſent. It is to be obſerved that acceptance, in caſes of bequeſt, is of two kinds.—I. Expreſs, which needs not to be explained.—II. Implied, which is where the legatee dies without having either declared his acceptance or refuſal; for this alſo is an acceptance in effect; becauſe the bequeſt is rendered complete on the part of the teſtator by his death, (in other words, it cannot be reſcinded after that event;) and as it was ſuſpended in its effect purely in deference to his right of rejection, it of courſe falls into his property upon his demiſe;—in the ſame manner as holds in a caſe of ſale with a reſerve of option to the purchaſer; in which inſtance, if the purchaſer die without formally ſignifying his aſſent to the ſale, it is then regarded as complete, and the article ſold is conſidered as part of his eſtate.

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IF a perſon deeply involved in debt bequeath any legacies, ſuch bequeſt is unlawful and of no effect; becauſe debts have a preference to bequeſts, as the diſcharge of debts is an abſolute duty, whereas bequeſts are gratuitous and voluntary; and that which is moſt indiſpenſable muſt be firſt conſidered. If, however, the creditors of the deceaſed relinquiſh their claims, the bequeſt is then valid, the obſtacle to it being removed, and the legatee being ſuppoſed to ſtand in need of his legacy.

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Bequest by an infant is not valid. *Shafeï* maintains that it is valid, provided it be made to a diſcreet and adviſable purpoſe; becauſe *Omar* confirmed the will of a *Yaffai*, (that is, a boy who has nearly reached the age of maturity;) and alſo, becauſe in the execution of it a degree of advantage reſults to the infant, inaſmuch as he acquires the merit of the deed,—whereas in the annulment of it he is deprived of all advantage. The arguments of our doctors, in ſupport of their opinion upon this point, are twofold.—First, a will is a voluntary act, concerning which an infant has not a capacity of forming a proper judgment. Secondly, the declaration of an infant is not of a binding nature; but if the validity of a bequeſt by ſuch were admitted, that effect would follow of courſe.—With regard to the tradition of *Omar*, the term *Yaffai*, there uſed, muſt be underſtood to mean a perſon juſt arrived at the age of maturity, or, "the *will* of the *Yaffai*" relates merely to the celebration of his obſequies, which is lawful in the opinion of our doctors. Beſides, the annulment of the will is advantageous to the infant, ſince in allowing his property to paſs to the heirs the rights of natural affection are maintained, as before mentioned. With reſpect to the aſſertion of *Shafeï*, that "in the execution of "the will an advantage reſults to the infant," it may be replied that the point to be attended to, in caſes of advantage or loſs, is, the immediate tendency of any act or deed, and not what may eventually reſult from it; in other words, if the deed itſelf, in its immediate tendency, produce advantage, the execution of it on account of the infant is preferable; but in the caſe here conſidered the deed, (that is, the bequeſt) in its immediate tendency, leads to a loſs of property, although eventually the infant have an advantage, the bequeſt having been made with a view to obtain merit in the eye of God; and ſince the bequeſt of the infant, in its immediate tendency, occaſions a loſs, it is not valid;—in the ſame manner as holds in caſe of a divorce; in other words, if an infant divorce his wife, or his guardian do ſo on his behalf, it is not binding, notwithſtanding a divorce may on many occaſions be attended with advantage,—as where an infant, having a wife who is poor, wiſhes to divorce her, and marry her ſiſter, who is rich and handſome.—In ſhort, bequeſt by an infant is invalid, according to our doctors;—and in the ſame manner, if an infant ſhould make a will, and die after he had attained to maturity, the will is not valid, as having been made at a time when he was unqualified for ſuch an act; and ſo likewiſe, if an infant ſhould ſay, "It is my will, whenever "I reach the age of maturity, that a third of my eſtate be conſidered "as a legacy in favour of a particular perſon," the will is not valid; becauſe an infant, being unqualified, is not competent to make a will that ſhall be deemed valid immediately, or that can be rendered ſo by being ſuſpended to a future period; in the ſame manner as he is incapable of divorce or emancipation. It is otherwiſe with reſpect to a ſlave or a *Mokatib*; for they poſſeſs a complete competency, obſtructed merely by the right of their maſter; and therefore all their acts (ſuch as divorce, bequeſt, or ſo forth) are perfectly valid if referred to a period when that bar no longer exiſts; as where a ſlave (for inſtance) ſays "I declare my wife to be divorced *whenever I am free*."

or a *Mokâtib*.

BEQUEST by a *Mokâtib* is not valid, notwithſtanding he leave effects ſufficient to diſcharge his covenanted ranſom; becauſe the property of a *Mokâtib* is not a fit ſubject of gratuitous acts. Some aſſert that this is according to *Haneefa*; but that the two diſciples hold a contrary opinion.

A bequeſt of (or in *favour* of) a fœtus in the womb is valid.

A WILL in favour of a fœtus in the womb, and a will bequeathing a fœtus, are both valid, provided the birth happen in leſs than ſix months from the date of the will. The ground on which the firſt caſe proceeds is, that a legacy is, in a manner, a ſucceſſion to property; and as a fœtus is capable to ſucceed in the caſe of inheritance, it is ſo likewiſe in the caſe of a legacy, that being analogous to inheritance. If, however, the legatee ſhould reject the legacy, it is rejected accordingly, as a bequeſt bears alſo the ſenſe of an *endowment*, which may be declined. It is different with *inheritance*, as that is purely a *ſucceſſion*, and is not annulled by the rejection of the heir.—Gift, moreover, differs from bequeſt, it not being (like bequeſt) admitted in favour of a fœtus; for gift is purely an *endowment*; and no perſon can endow a fœtus with any thing. The ground, on the other hand, on which the ſecond caſe proceeds is, that the exiſtence of the fœtus is underſtood at the period of making the will; and as the legacy of things not yet in being (ſuch as the fruit a tree may hereafter yield) is valid, it follows that a legacy of a thing actually exiſting is valid *a fortiori*.

A female ſlave may be with the exception of her progeny.

If a perſon bequeath a female ſlave, and except the offspring of her womb, both the bequeſt and the exception are valid. The *bequeſt* is valid, becauſe the words "female ſlave" do not include the offspring. As, however, in the bequeſt of a female ſlave, her offſpring is included dependantly, where the bequeſt is abſolute, it follows that where a ſlave is bequeathed with an exception of her offſpring, ſuch bequeſt is valid. The *exception* alſo is valid; becauſe as it is permitted to bequeath a fœtus in the womb, it is alſo allowable to except it from a legacy; for it is a rule that whatever is in itſelf capable of being the ſubject of a deed may alſo be excepted from that deed; and *vice verſa*. Beſides, the acceptance of the legatee is ſuſpended until the death of the teſtator; and the annulment of the declaration, previous to the acceptance, is valid, as in a caſe of *ſale* for inſtance.

is declaration of the teſtator; or by any act

Upon the teſtator either expreſsly reſcinding his bequeſt, (as if were to ſay, "I retract what I had bequeathed,") or performing any act which argues his having reſcinded it, retractation is eſtabliſhed. It is eſtabliſhed, in the former inſtance, evidently; and ſo likewiſe in latter; for as acts are demonſtrative of the inclination as much as expreſs words, they are conſequently equivalent thereto.—It is to be obſerved, that if the teſtator perform, upon the article he had bequeathed, any act which, when performed on the property of another,

other, is the cauſe of terminating the right of the proprietor, (ſuch as the ſlaughter of a goat, or the fleaing, roaſting, or boiling of it, the fabrication of a veſſel from a piece of copper, the grinding wheat into flour, or the fabrication of a ſword from iron,)—ſuch act is a retractation of the bequeſt. If, alſo, he perform upon it any act creating an addition to the legacy, and this addition be ſo connected, that the legacy cannot be ſeparately delivered, (as where a perſon bequeaths the flour of wheat, and afterwards mixes it with oil,—or a piece of ground, and afterwards erects a building on it,—or undreſt cotton, and afterwards dreſſes it,—or a piece of cloth, and afterwards lines or covers a gown with it,)—ſuch act is a retractation of the bequeſt. It is otherwiſe with reſpect to plaiſtering the wall of a bequeathed houſe, or undermining the foundation of it; for theſe acts do not indicate a retractation of the bequeſt, as they affect the legacy in its *dependancies* only.

EVERY act or deed which occaſions an extinction of the property of the teſtator is a retractation from his bequeſt,—(as where, for inſtance, a teſtator ſells the article he had bequeathed, and afterwards purchaſes it,—or gives it to ſome perſon, and afterwards retracts the gift,)—and conſequently, the legacy does not go to the legatee after his [the teſtator's] deceaſe;—becauſe a will can hold good only with reſpect to the teſtator's property; and therefore, upon his property being extinguiſhed, the bequeſt becomes null of courſe. (It is to be obſerved that the waſhing of a bequeathed garment is not a retractation from the bequeſt; on the contrary, it is rather a confirmation of it, as it is a cuſtom to waſh garments before they are given to any perſon.)

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IF a teſtator deny his bequeſt, and the legatee produce witneſſes to prove it, there is in that caſe a difference of opinion among our doctors;—for according to *Mohammed* this is not a retractation;—whereas *Aboo Yooſaf* maintains that it *is* ſo, becauſe *retractation* ſignifies

of it;

nifies the teſtator negativing his bequeſt *at the preſent time*; and as the denial is a negative applying both to the *preſent* and to the *paſt*, it therefore amounts to a retractation *a fortiori*. The argument of *Mohammed* is, that the denial of a bequeſt ſignifies the putting a negative upon it with reſpect to the *paſt*, of which its being negatived with reſpect to the *preſent* is a conſequence; and upon the bequeſt being proved, by witneſſes, to exiſt at preſent, the denial is of no effect. Another argument is, that as a retractation implies the former exiſtence of a will, and the preſent annihilation of it, and denial (on the other hand) diſavows both the former and the preſent exiſtence of it, there is therefore an evident difference between a retractation and a denial; whence the latter ought not to be conſidered in the light of the former;—and accordingly, denial not being a retractation, if a huſband deny his marriage, and the wife bring witneſſes to prove it, ſtill a ſeparation does not take place between them.

nor his declaring it *lawful* or

If a teſtator declare the will he has made in favour of a particular perſon to be *unlawful* or *uſurious*, this is not a retractation, becauſe the ſpecification of it under the deſcription of illegality or uſury is a plain proof that the ſubject of the deſcription (namely, the will) does actually exiſt. The caſe would be different if he ſhould declare the will to be *null*; for that is evidently a retractation; becauſe, as a thing which is null is non-exiſtent, the deſcription of *null* evinces that the thing ſo deſcribed no longer exiſts. It is otherwiſe with the deſcription of unlawful; for that indicates a continuance of the exiſtence, as illegality cannot apply to a *nonentity*.

or deferred.

If a teſtator ſhould deſire that the execution of his will be ſuſpended for ſome time after his death, this is not a retractation. If, on the contrary, he ſay "I depart from my will," he is then held to have retracted it.

A bequeſt to one perſon is ſame to another,

IF a perſon ſay, "I will that a particular ſlave, which I formerly "bequeathed to *Zeyd*, be given as a legacy to *Amroo*," in that caſe "a retractation from the firſt will is eſtabliſhed, as the tenor of his ſpeech evidently ſhews that it was not his intention they ſhould both partake of the legacy. It is otherwiſe where a perſon firſt leaves a particular article to one man, and then leaves the ſame thing to another;—as if he ſhould ſay, "I will that this thing be given to *Zeyd*," and afterwards make a bequeſt of the ſame thing in favour of *Amroo*;—for in that caſe a retractation of the firſt will does not take place; the ſubject being capable of diviſion, and the ſeparate ſentences bearing that conſtruction.

unleſs that other be then ali

IF a perſon ſay, "the ſlave which I formerly left to *Zeyd* I now "bequeath to *Amroo*," and at that time *Amroo* be not alive, the firſt will, in favour of *Zeyd*, holds good; for *that* was annulled only on account of the legacy having been completely deviſed to *Amroo*; and upon this no longer remaining in force, becauſe of *Amroo*'s death, the firſt will reverts.—If, on the contrary, *Amroo* be alive at the time of the bequeſt in his favour, and afterwards die before the teſtator, the legacy [the ſlave] in that caſe paſſes to the heirs, both bequeſts being void,—the firſt, becauſe of the retractation,—and the laſt, becauſe of the death of the legatee previous to that of the teſtator.

## CHAP. II.

## Concerning the Bequeſt of a Third of the Eſtate.

Caſe of a perſon bequeathing two thirds of his property to two perſons reſpectively.

If a perſon bequeath a third of his property to one man, and a third to another, and the heirs refuſe their conſent to the execution of both bequeſts, one third is in that caſe divided equally between the two legatees; for where the will exceeds a third of the eſtate, and the heirs refuſe their conſent to the execution of the whole, it is then reſtricted to one third, as has been already explained; and as, in the preſent inſtance, the right of both claimants is equally good, and the third is capable of diviſion, it is therefore divided equally between them.

or a third to one and a ſixth to the other.

If a man bequeath a third of his property to one perſon and a to another, and the heirs refuſe to confirm the whole, in that one third of the property is to be divided between the legatees in three equal lots, two to the legatee of the *third*, and one to the legatee of the *ſixth*; becauſe the bequeſt does not hold good for any thing beyond one third; and as both the legatees lay their claims on equally good ground, and it is impoſſible to diſcharge their demands (namely, a third and a ſixth) with one third only, that is therefore ſhared between them in proportion to their reſpective claims, in the ſame manner as is practiſed with creditors, in diſcharging the debts of a perſon who dies inſolvent. Here, moreover, the right of one legatee is to a ſixth, and that of the other to a third; and as a third is twice the amount of a ſixth, the third is therefore divided between the claimants in three ſhares, two ſhares going to the one, and one ſhare to the other.

Caſes of *Mobabàt* wills;

[* A WILL by way of *Mobabàt*, on a deathbed, is the ſame in effect as a bequeſt of property, and is therefore executed to any amount not exceeding a third of the teſtator's eſtate. (*Mobabàt* literally ſignifies a *gift*. In the language of the LAW it means a gift interwoven in ſome compact or deed, as if a perſon ſhould ſell part of his property to another at an inferior value.)

IF a perſon, having two ſlaves, one eſtimated at thirty *dirms*, and the other at ſixty, ſhould on his deathbed will that the ſlave worth thirty *dirms* be ſold to *Zeyd* for ten, and that the other worth ſixty, be ſold to *Omar* for twenty,—in that caſe *Zeyd* obtains a *Mobabàt* of twenty *dirms*, and *Omar* a *Mobabàt* of forty *dirms*; and this is what is denominated a will by *Mobabàt*. But if the teſtator ſhould not be poſſeſſed of any other property than theſe two ſlaves, and the heirs refuſe to ratify the will, in that caſe the *Mobabàt* is executed only in the proportion of a third. Now the whole of the property is ninety *dirms*, that being the aggregate value of the two ſlaves: one third of that, therefore, (being thirty *dirms*,) is divided into three ſhares, two of which are given in *Mobabàt* to *Omar*, and one to *Zeyd*; that is, the ſlave worth ſixty *dirms* is ſold to *Omar* for forty, and the other, worth thirty, to *Zeyd*, for twenty.

IF a perſon, having two ſlaves, one valued at thirty *dirms*, and the other at ſixty, ſhould on his deathbed emancipate both, ſuch manumiſſion is in effect a bequeſt. If, therefore, the perſon in queſtion leave no other property than theſe two ſlaves, and the heirs refuſe their conſent to the emancipation, it takes effect in the proportion of one third; that is to ſay, each of the ſlaves is rendered free in one third of his value, and muſt earn the freedom of the remaining two thirds by emancipatory labour.

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* The whole paſſage within the crochets ſeems to be an interpolation of the *Molovees* employed in the compoſition of the *Perſian* verſion of the HEDAYA, as the tranſlator has conſulted various *Arabic* copies, without finding it in any of them. It may poſſibly have been inſerted in ſome copies of the work in the manner of *marginal illuſtrations*, which induced the *Molovees* to give it a place in the text.

and bequeſts of ſpecific ſums of

If a perſon bequeath a particular number of *dirms*, without ſpecifying the relative proportion they bear to his eſtate,—ſuch as a half, a third, a fourth, or the like,—it is valid, but is executed only to the extent of a third of his whole property, unleſs the heirs be willing to confirm the whole. Thus if a perſon, having only ninety *dirms*, ſhould bequeath thirty to *Zeyd*, and ſixty to *Omar*, and the heirs refuſe their aſſent to it, in that caſe the ſum of the two legacies is reduced to thirty of which *Zeyd* receives ten, and *Omar* twenty.]

Caſe of a perſon bequeathing the *le* of his eſtate to one, and then a *third* of it to another.

If a perſon firſt bequeath the whole of his eſtate to one man, and then a third of it to another*, and the heirs refuſe their aſſent, in that caſe one third of his eſtate is divided into four ſhares, of which three are given to the legatee of the whole, and one to the legatee of the third. This is according to the two diſciples. *Haneefa* alleges that the third of the eſtate muſt be divided equally between the two legatees; for in his opinion, when a legacy is extended beyond a third, the exceſs is of no weight in the determination. The argument of the two diſciples is, that the teſtator has two objects in view; for *firſt*, he deſigns that each of the legatees ſhall receive the whole of his legacy; and *ſecondly*, that a ſuperiority of the one over the other ſhall be maintained. Now the attainment of the *firſt* of theſe objects is impoſſible, becauſe of the right of the heirs, and is, indeed, in itſelf impracticable; but as there is no bar to the full accompliſhment of the *ſecond* object, the ſuperiority of the one over the other is preſerved, in the ſame manner as in the caſes of bequeſt by *Mohabát*, or emancipation, or, of legacies of a ſpecific number of *dirms*. The argument of *Haneefa* is, that a will is null and void in whatever degree it may exceed a third of the eſtate, where the heirs refuſe their aſſent; and cannot on any ſort of pretext be executed in that amount, as being repugnant to the ordinance of the LAW in this particular. Since, therefore, the will is rendered null in the exceſs above a third, one object of the teſtator (namely, to eſtabliſh a ſuperiority) is alſo rendered null, as being comprehended in it; in the ſame manner as a *Mohabát* is rendered null when interwoven in a contract of ſale which is afterwards invalidated; as where, for inſtance, a perſon ſells, by *Mohabát*, a ſlave valued at thirty *dirms* for twenty, and the ſale afterwards becomes void in conſequence of the loſs of the ſubject of it, previous to the delivery,—in which caſe the *Mohabát* alſo becomes void. It is otherwiſe in the caſes of bequeſt by *Mohabát* or emancipation, or of legacies of a ſpecific number of *dirms*; for there the validity does not reſt on the conſent of the heirs; it being eventually poſſible that the bequeſts may become valid notwithſtanding the heirs ſhould refuſe to ratify them, by the teſtator, (for inſtance,) after making the bequeſt, increaſing his property to a degree that might render the amount of the bequeſt no more than equal to, or leſs than, one third of the whole. Since, therefore, in theſe caſes, the bequeſt is not in itſelf null, but rather ſtands within the poſſibility of being valid, a regard muſt conſequently be paid, in ſuch inſtances, to the ſuperiority of one of the parties. It is otherwiſe in the caſe here conſidered; for it is in this inſtance impoſſible that the will ſhould be valid, as has been already ſhewn. It is alſo otherwiſe where a perſon bequeaths a particular ſlave, valued at one thouſand *dirms*, to *Zeyd*, and another, valued at two thouſand *dirms*, to *Bicker*, and has himſelf no other property than theſe ſlaves; for although, in this caſe, there be a poſſibility that the teſtator may ſo increaſe his property as to render the amount of the two ſlaves equal to, or leſs than, a third of the whole, yet *Bicker* would receive a proportion according to the third, not according to the amount of the legacy, (viz. two thouſand *dirms*;) becauſe here the right of the legatees is connected with the ſubſtance of the ſlaves, on this ground, that if the ſlave ſhould be deſtroyed, the will would be rendered void, notwithſtanding the teſtator might have acquired other property. Hence the apprehenſion before ſtated is of no weight in this inſtance, as the right of the legatee is here connected with the very article with which the right of the heirs has a connexion. In the caſe, on the contrary, of a legacy of a ſpecific number of *dirms*, if the property of the teſtator be deſtroyed, and he afterwards acquire more, the legacy would be valid, and executed by means of the newly acquired property; whence it is plain that the right of the legatee, in the caſe of a legacy of a ſpecific number of *dirms*, is not connected with the ſubſtance, and conſequently is not annulled on account of its deſtruction.

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* This ſuppoſes the teſtator, firſt, to ſay "I bequeath the *whole* of my property to (for inſtance,) and again, at ſome future time, "I bequeath a *third* of my property to *Amroo*."

The bequeſt of "a ſon's "portion of "inheritance" is void, but not the bequeſt of an *equivalent* to it.

If a perſon bequeath to another "*his ſon's portion of inheritance**," ſuch bequeſt is null; whereas, if he bequeath "*an* EQUIVALENT *to* "*his ſon's portion*," ſuch bequeſt is valid; for the firſt is a bequeſt of what is the property of another, whereas the ſecond is merely a bequeſt of ſomething ſimilar; and the ſemblance of a thing is different from the thing itſelf, notwithſtanding its rate be determined thereby. *Ziffer* is of opinion that a bequeſt of the former nature is likewiſe valid; becauſe at the time of making it the portion belonged evidently to the teſtator. In reply to this, however, it is to be obſerved, that the legacy does not take place until after the death of the teſtator, when the property does not belong to him, and hence his bequeſt of his ſon's portion is a bequeſt of property not his own.

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* In this, and ſeveral ſubſequent examples, the effect depends entirely upon the terms in which the bequeſt is conceived, and which muſt therefore be particularly attended to.—Thus, in the preſent inſtance, the teſtator is ſuppoſed to ſay, "*I bequeath to* SUCH AN ONE "*my ſon's portion of inheritance*;" and ſo of the reſt.

A bequeſt of "a portion"

the portion inheritable from it.

If a perſon bequeath "*a portion of his eſtate*," the legatee is in that caſe entitled to the ſmalleſt portion allotted to any of the heirs,—provided, however, that ſuch portion be not leſs than a ſixth, for then a complete ſixth muſt be given to him; and if it ſhould *exceed* a ſixth, in that caſe alſo a ſixth is given to him; for he is in no wiſe to get more than a ſixth. A caſe in which one of the inheritable portions is leſs than a ſixth is where, for inſtance, a perſon bequeaths to another "*a portion of his eſtate*," and leaves heirs, at his death, a ſon and a wife;—in which caſe, although the ſhare of the wife be only an eighth, yet the legatee receives a ſixth, and the remainder is then divided between the wife and ſon [the heirs] according to the ordinances of the LAW. A caſe, on the contrary, in which all the inheritable portions exceed a ſixth, is where, for inſtance, a perſon makes a bequeſt in the terms here ſtated, and dies, leaving heirs a full brother and wife; in which caſe, although the ſmalleſt portion be a fourth, yet the legatee is only entitled to a ſixth; and that being paid to him, the remainder is then divided between the brother and wife, agreeably to the ordinances of the LAW. This is according to *Haneefa*. *Aboo Yooſaf* and *Mohammed* are of opinion that the legatee is entitled to the loweſt ſhare, whatever be its amount, provided it do not exceed a third; but if it exceed a third, an exact third muſt be given him, and not more, unleſs the heirs be conſenting thereto. The argument on which they ground this opinion is, that the word *Sehm* [portion,] both in its literal and received ſenſe, means *a portion allotted to an heir*; and as the ſmalleſt ſhare is a matter of certainty, it is therefore adopted as the ſtandard; except where the ſmalleſt portion of inheritance exceeds a third, in which caſe the bequeſt is executed in the proportion of a third, as a legacy exceeding a third is not valid, unleſs confirmed by the heirs. The argument of *Haneefa* is, that *Sehm*, according to the interpretation of the LAW, means a ſixth; a legacy of a *Sehm* having been left in the time of the prophet, who ordained that a ſixth of the property of the teſtator ſhould be given to the legatee. In its literal ſenſe, moreover, it bears the ſame meaning, becauſe *Ayáſs*, a man ſkilled in the *Arabic* language, who was *Kázee* of *Bagdad*, declared that *Sehm* literally ſignified a ſixth. Since, therefore, *Sehm*, both in the practice of the LAW, and the literal ſignification, means a ſixth, the legatee in caſes of this kind is always entitled to it, and to no more.—(Several lawyers, however, remark, that although this was the received ſenſe of *Sehm* in thoſe days, yet in our time it means, indefinitely, a *portion*, or *part*.)

A bequeſt of "*part* of the "eſtate" undefined, may be conſtrued to apply to *any* part.

IF a perſon bequeath "*a part of his property*" to another without ſpecifying *to what amount*, the heirs are at liberty to give whatever they pleaſe to the legatee; for here the amount of the bequeſt is unknown; but as the uncertainty with reſpect to that is no bar to its validity, it is therefore valid; and ſuch being the caſe, and the heirs being the repreſentatives of the teſtator, it is conſequently at their diſcretion to fix the amount, in the ſame manner as the teſtator himſelf might do if he were living.

Caſe of a perſon bequeathing firſt a

to the ſame perſon;

IF a perſon bequeath "*a ſixth of his property*" to another, and afterwards, before the ſame or another company, bequeath "*a third* "*of his property*" to that ſame perſon, in this caſe the legatee is entitled to a third of the teſtator's eſtate, whether the heirs be conſenting or not, the ſixth being included in the latter bequeſt of a third.

or, firſt a third, and

to the ſame perſon.

IF a perſon bequeath "*a third of his property*" to another, and afterwards, either before the ſame or another company, bequeath "*a* "*ſixth of his property*" to the ſame perſon, in that caſe the legatee is entitled only to the ſixth. (The proofs, in this inſtance, are drawn from the *Arabic*.)

A perſon be-

particular property, if

IF a perſon bequeath to another "*a third of his* DIRMS," amounting in all to three thouſand, or "*a third of his goats*," amounting in all to three, and afterwards two thirds of the *dirms* or goats be loſt or deſtroyed, two thirds of it be loſt, and the

of the teſta tor's eſtate, the legatee is entitled to the whole of ſuch remainder.

deſtroyed, ſo that only one third remains, and the remaining third do not amount to a third of the whole of the teſtator's property, (he having been in poſſeſſion of *other* things beſides the *dirms* or goats,) the legatee is entitled to the complete remaining third; that is, to a thouſand *dirms* in the firſt caſe, and to one goat in the ſecond. *Ziffer* maintains that the legatee is entitled only to one third of what remains,—that is, in the firſt inſtance to one third of one thouſand *dirms*, and in the ſecond to the third of the value of the goat; becauſe the heirs and the legatee having had proportionate claims to the whole in an indefinite manner, are to participate in the loſs according to the proportion of their claims;—in the ſame manner as holds where the effects are of different kinds, ſuch as a gown, a ſlave, and a houſe; for if "*one of theſe three*" be bequeathed to a particular perſon in an indefinite manner, and two of them be afterwards deſtroyed, the remaining one is divided between the heirs and the legatee; and ſo likewiſe in the preſent inſtance. Our doctors, on the other hand, argue that it is poſſible completely to maintain the right of one of two partners (ſuch as the *legatee*, in the preſent inſtance) in one of three articles, where they are all of the ſame claſs; (whence it is that the holder of a partnerſhip property may be compelled, if it be of a homogeneous nature, to make a diviſion of it among the partners; the diviſion, with reſpect to any unique and ſpecific article, being the right of each partner reſpectively;)—and as the bequeſt precedes the right of the heirs *, the right of the legatee is therefore completely maintained with reſpect to the thouſand *dirms* in queſtion;—the caſe being in fact the ſame as where a perſon bequeaths another three *dirms*, two of which are afterwards loſt,—when the remaining *dirm* goes completely to the legatee, according to all our doctors. It is otherwiſe where the effects bequeathed are of different kinds; for there, after the loſs or deſtruction of two of the articles, neither the complete right of the whole, nor the complete particular right of any one of the parties, can be maintained by means of the remaining article; and therefore the diviſion is not ſet aſide in favour of the legatee on account of the priority of his claim; on the contrary, the remaining article is divided among the parties, according to the nature of their re[illegible]e claims.

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* The debts and bequeſts due from an eſtate are diſcharged previous to the diſtribution the portions of inheritance.

A bequeſt of "*the third* "*of*" an article, part of which is afterwards deſtroyed, holds with reſpect to a third of the remainder.

If a perſon bequeath to another "*a third of his clothing*," of which two thirds are afterwards deſtroyed, and the remaining third exceed in value a third of the whole property of the teſtator, the legatee is in that caſe entitled to only one third of the veſtments that remain. Lawyers, however, have obſerved that this is only where the veſtments are of different kinds; for otherwiſe they are conſidered in the ſame light as *dirms*;—and ſo likewiſe of all articles of weight, or meaſurement of capacity, as it is poſſible, in thoſe alſo, to maintain complete the right of particular partners to particular portions,—whence it is that a diviſion of ſuch among partners may be compelled.

If a perſon bequeath to another "*the third of his three ſlaves*," and two of them afterwards die, the legatee is entitled only to a third of the value of the remaining ſlave; and the ſame rule alſo holds with reſpect to different houſes. Some ſay that this is according to *Haneefa* only; and others, that it is the opinion of all our doctors. The compiler of the *Hedaya* remarks that it is approved, proceeding upon the general rule before ſtated, that "in all articles which admit of the "rights of the partners being united in them, it is practicable to unite "the right of the legatee."

A legacy of muſt in full with the property in hand, although all

If a perſon whoſe eſtate conſiſts, partly of ready money, and partly of debts due to him from others, bequeath to another one thouſand *dirms*, and that ſum exceed not a third of the *exiſtent* property, it is paid to the legatee without any deduction. If, on the contrary, it exceed a third of the ready property, he is only to receive a third of the amount in hand; and afterwards a third muſt be paid him, of whatever ſums may occaſionally be recovered by the heirs, until in this manner the amount of the legacy be completely diſcharged. The reaſon of this is that the legatee is (as it were) a partner with the heirs; and therefore, if his claim in particular were diſcharged with the ready property (by its being applied to the payment of the whole of his legacy,) an injury would be occaſioned to the right of the heirs, as ready money is allowed to be preferable to money that is due.

the reſt of the eſtate ſhould be expended in debts.

IF a perſon leave a third of his property “*to* ZEYD *and* OMAR,” and *Omar* be at that time dead, the whole of the third is given to *Zeyd*, whether the teſtator, at the time of making the will, have been acquainted with the death of *Omar* or not; for as a defunct is not capable of becoming a legatee, he therefore cannot prevent a living perſon from being ſo;—in the ſame manner as where, for inſtance, a perſon bequeaths ſomething “*to* ZEYD *and to a* WALL.” According to one tradition from *Aboo Yooſaf* it is ſaid, that if the teſtator were not acquainted with the death of *Omar*, *Zeyd* is then entitled only to one half of the third; for on ſuch a ſuppoſition the will in favour of *Omar* was valid in the opinion of the teſtator; which ſufficiently indicates his will and intention to have been that *Zeyd* ſhould receive only one half of the third. But if, on the other hand, he was acquainted with the circumſtance of *Omar*'s death it is evident that he intended that *Zeyd* ſhould receive the whole, as a will in favour of a dead man is vain and uſeleſs.

A legacy left to *two* perſons, one of them being at that time dead, goe

tee

IF a perſon will that one third of his property “*be divided, as a legacy, between* ZEYD *and* OMAR,” and *Omar* be at that time dead, *Zeyd* is entitled to only one half of the third; for the words uſed by the teſtator clearly denote his intention that each ſhould have an half; but *Omar* being at that time dead, the will with reſpect to him is void.

A legacy be-
in
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two
ind
die, a *moiety*
to the other.

A bequeſt made by a *poor* man is of force if he afterwards become rich.

If a perſon who is poor bequeath to another "*the third of his property,*" and afterwards become rich, the legatee is in that caſe entitled to a third of his eſtate, to whatever amount; for the bequeſt does not take effect until after the death of the teſtator; and therefore the condition of its validity is, his being poſſeſſed of property *at the time of his deceaſe.* The LAW is alſo the ſame in caſe the teſtator, being rich at the time of making the will, ſhould afterwards become poor, and again acquire wealth.

A bequeſt of any article, not exiſting in the poſſeſſion or diſpoſal of the teſtator at his deceaſe, is null.

If a perſon bequeath "*a third of his* GOATS" to another, and it happen either that he has no goats, or that ſuch as he had were deſtroyed before his death, the bequeſt is null; for the condition of its validity is, the teſtator being poſſeſſed of the property *at the time of his deceaſe*, which is not here the caſe. If, on the contrary, having no goats at the time of making the will, he ſhould afterwards acquire goats, ſo as to leave ſome at his death, one third of them goes as a legacy to *Zeyd* (according to the *Rawâyet Saheeh*;) for here the condition of validity (namely, that the teſtator die poſſeſſed of the property) exiſts.

it was referred to his *property*, in which caſe it

by

of

If a perſon bequeath "*a* GOAT *of his property*" to *Zeyd*, and afterwards die without leaving any goats, the price of a goat muſt in that caſe be paid to *Zeyd*; for the teſtator's expreſſion "*a* GOAT *of his* "*property*" denotes his intention to bequeath the *worth* of the animal. If, on the contrary, he neither bequeath "*a goat of his property,*" nor "*one of his goats,*" but ſimply "*a goat,*" (to *Zeyd*) without any relation to his property or herd of goats, in that caſe there is a difference of opinion, ſome ſaying that the bequeſt is not valid, as the abſolute expreſſion of the teſtator denotes his intention to have been a legacy of the animal itſelf, of which he had none,—whilſt others maintain it to be valid, for this reaſon, that the teſtator having ſpecified a *goat*, of which he had none, muſt be ſuppoſed to have intended the of it. If, on the other hand, the words of the teſtator were "*I bequeath*

"*I bequeath one of my goats*," in that caſe the bequeſt is evidently invalid; becauſe the relation to his herd of goats determines the legacy to have been reſtricted to the animal itſelf. (A variety of caſes of this nature occur, and are determined on the principle now ſtated.)

IF a perſon bequeath "*a third of his property to his* AM-WALIDS, "*to the diſtreſſed, and to beggars*," and the *Am-Walids* amount to three in all,—in that caſe, according to the two *Elders*, a third of his property is, after his death, divided into five ſhares, of which three are given equally among the *Am-Walids*, one to the diſtreſſed, and one to beggars. *Mohammed*, on the contrary, ſays that it is to be divided into ſeven ſhares, of which three are diſtributed in equal portions among the *Am-Walids*, two given to the diſtreſſed, and two to beggars*.

Diſtribution of a bequeſt made indefinitely to three different deſcriptions of perſons;

IF a perſon bequeath "*a third of his property to a certain perſon and to the diſtreſſed*," in that caſe, according to the two *Elders*, the third is divided into two equal parts, one of which is given to the perſon named, and the other to the diſtreſſed; whereas *Mohammed* maintains, that it muſt be divided into *three* ſhares, one to be given to the ſaid perſon, and two to the diſtreſſed.

or, to an indiv [illegible] a p. [illegible] claſs of people,

IF a perſon bequeath "*a third of his property to the diſtreſſed*," the two *Elders* are of opinion that the executor may in that caſe give the whole of the third to one diſtreſſed perſon; whereas *Mohammed* holds that it cannot be given to fewer than *two*.

or to a particular claſs of people alone.

IF a perſon bequeath one hundred *dirms* to *Zeyd*, and one hundred to *Amroo*, and afterwards declare *Bicker* to be a participator with them,

Caſe of a [illegible]

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* The arguments are here omitted, as (in this and ſome following inſtances) they turn on certain peculiarities in the grammar of the *Arabic* language.

ted, by the
two
other legatees.

by ſaying "I have made thee *Bicker* a ſharer with *Zeyd* and *Omar*," *Bicker* is in that caſe entitled to a third of each of their portions, in order that he may be put on an equality, as the words of the teſtator evidently imply that intention, for the term uſed by him [*Shirkat*] literally means equality, which it is here poſſible to preſerve, and there is no impracticability in the execution of the bequeſt. It is otherwiſe, where the portions of the legatees are unequal, as if the legacy of *Zeyd* were four hundred *dirms* and that of *Omar* two hundred, and *Bicker* were declared by the teſtator to be a ſharer with them; for in that caſe the eſtabliſhment of an equality is impracticable, and therefore *Bicker* is entitled to receive a moiety of each of their ſhares, that they may be brought as nearly on an equality as poſſible.

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eſtate.

If a perſon, on his death bed, ſay to his heirs, "I am indebted to "*Zeyd*, and you muſt credit what he ſays," in that caſe the claim of *Zeyd*, to any amount not exceeding a third of the eſtate, muſt be admitted, although the heirs ſhould falſify it. This proceeds on a favourable conſtruction. Analogy would ſuggeſt that the declaration of *Zeyd* is not to be credited; for although an acknowledgment concerning a thing undefined be approved, ſtill its effect depends upon the aſcertainment of it; and as that cannot be had, becauſe of the death of the acknowledger, it would follow that the declaration of *Zeyd* is of no weight. The reaſon, however, for a more favourable conſtruction, in this particular, is, that the object of the acknowledger is evidently to give *Zeyd* a preference over his heirs; and it being poſſible to execute his deſign in the way of a bequeſt, and men being (moreover) deſirous of diſcharging themſelves of obligations where they may know of the debt itſelf, but are uncertain as to the amount, (as having forgotten it,) the acknowledgment is therefore conſidered equivalent to a bequeſt of which the amount is left to the determination of the legatee,—whence the matter is regarded in the ſame light as if the acknowledger had ſaid to his heirs, "if *Zeyd* come and claim any "thing from you on my behalf, pay him the ſame, to whatever "amount,"

"amount,"—which declaration would be recognized and complied with, to the amount of one third of the eſtate; and the acknowledgment being thus equivalent to a bequeſt, the declaration of *Zeyd* muſt be credited to the amount of one third of the acknowledger's eſtate, and no more. If, therefore, beſides the acknowledgment in queſtion, the dying perſon had made various bequeſts in favour of others, one third of his eſtate muſt be ſet apart for the legatees, and two thirds for the heirs, when both parties muſt be required "to verify the declaration of *Zeyd* to ſuch extent as they may think proper." Now, if both parties acknowledge that there is ſomething owing to *Zeyd*, it is evident that there reſts a debt upon the eſtate affecting the ſhares of each reſpectively; and accordingly, a deduction is made from the legatees, to the amount of one third of what they acknowledge to be owing to *Zeyd*, and from the heirs, to the amount of two thirds of what they have ſo acknowledged, in order that the acknowledgment of each party may be carried into execution in proportion to his right in the whole eſtate. If *Zeyd* ſhould claim ſtill more than what falls to him in virtue of this acknowledgment of the parties, each party [the heirs and legatees] muſt be reſpectively required to make oath, to the *beſt of their knowledge*, or, in other words, to this effect, that "they do not *know* of any more being due to *Zeyd*;"—for they cannot be required to ſwear *poſitively*, as their oath regards a matter between the claimant and the acknowledger merely, and in which they are not principals.

A joint bequeſt to an heir and a ſtranger is executed in favour of

IF a perſon bequeath any article jointly to one of his heirs and a ſtranger, in this caſe the bequeſt in favour of the heir is not admitted, and a moiety only of the legacy is given to the ſtranger; becauſe, as an heir poſſeſſes the capacity of being a legatee [*], he therefore oblatter only, to the extent of one half;

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[*] The incapacity of an heir to ſucceed to a legacy does not ariſe from any *natural* or *original* defect in him, but is occaſioned ſolely by the ordinance of the LAW in this particular, which ſuſpends it upon the conſent of his co-heirs.

ſtructs the ſtranger in the title which he would otherwiſe have to the complete legacy. It is not ſo where a legacy is left between one perſon living and another dead, for here the whole goes to the living legatee, ſince as a dead perſon is incapable of ſucceeding to a bequeſt, there is no obſtruction in this inſtance.

ſo likewiſe a joint bequeſt to the *murderer* of the teſtator and a ſtranger.

If a perſon make a will jointly in favour of his murderer and a ſtranger, in that caſe the murderer is not entitled to any thing, and the ſtranger receives only a moiety of the legacy, for the reaſon aſſigned in the foregoing caſe, to wit, that the murderer (like an heir) poſſeſſes the capacity of being a legatee, and therefore obſtructs the ſtranger's title to the whole, as there ſtated. It is otherwiſe where a perſon, on his deathbed, makes a declaration of any ſpecific thing or ſum due by him to one of his heirs and a ſtranger jointly; for there the declaration is invalid as well with reſpect to the ſtranger as the heir. The reaſon of this diſtinction is, that a will or bequeſt is an indication of endowment; and as, by it, a joint concern is eſtabliſhed between the two legatees, the bequeſt is therefore valid with reſpect to him, of the two, who is not under a legal incapacity, namely, the ſtranger;—whereas a declaration or acknowledgment is an annunciation of the right of the parties in whoſe favour it is made, referred to a paſt time, under the deſcription of joint concern, a thing which cannot be eſtabliſhed; for the eſtabliſhment of it with reſpect to the ſtranger only, independant of the deſcription of joint concern, is contrary to the tenor of the dying perſon's declaration; and the eſtabliſhment of it (on the other hand) in the manner of joint concern, occaſions the eſtabliſhment of a declaration in favour of an heir, upon a deathbed, which is unlawful.

Any accident occaſioning

ees annuls
he will.

If a perſon bequeath three garments of different prices, the beſt to *Zeyd*, the next in value to *Omar*, and the worſt to *Bicker*, and one of theſe garments be afterwards loſt, without its being known which of them it was, and the heirs of the teſtator declare, to each legatee in particular, that "his ſhare is loſt," the bequeſt is null *in toto*, as it is in this caſe uncertain who are the legatees, and ſuch uncertainty occaſions an annulment of the will, ſince the *Kázee* cannot paſs a decree concerning a thing unknown. If, on the contrary, the heirs make over the two remaining garments to the legatees, the bequeſt is not null, but ſtill continues in force, and thoſe two garments are divided among them, by two thirds of the beſt being given to *Zeyd*, two thirds of the worſt to *Bicker*, and the remaining third of each to *Omar*.

Bequeſt of an houſe

IF *Zeyd* bequeath to *Omar* a ſpecific apartment of a houſe held in partnerſhip between him and *Bicker*, it is requiſite that a partition be made of the houſe; and then, if the apartment ſo bequeathed ſhould fall within the ſhare of *Zeyd*, it muſt be given to *Omar* as his legacy, according to the two *Elders*; whereas, according to *Mohammed*, he is entitled only to one half of it. If, on the other hand, the apartment ſo bequeathed ſhould not fall within the ſhare of *Zeyd*, then, according to the two *Elders*, a number of cubits equal to the ſize of the bequeathed apartment muſt be given to *Omar* from the ſhare of *Zeyd*, whereas, according to *Mohammed*, he is entitled only to *half* that number. The argument of *Mohammed* is that in this caſe the teſtator has bequeathed partly his own property, and partly the property of another, inaſmuch as the houſe was ſhared equally between him and *Bicker* in all its parts. The bequeſt, therefore, takes effect with reſpect to the former, but remains ſuſpended with reſpect to the latter; and if, upon the partition, (which is a ſpecies of exchange) the apartment fall within the ſhare of *Zeyd*, ſtill that part of the bequeſt which had remained ſuſpended does not take effect, any more than where a perſon bequeaths to another ſome article which does not belong to him, and afterwards purchaſes that article. Where, moreover, upon a partition of the houſe, the apartment in queſtion falls to the ſhare of the teſtator, his bequeſt takes effect with reſpect to the actual legacy, namely, an half of the apartment; whereas if, on the contrary, it fall to the lot of *Bicker*, *Amroo* (the legatee) is to receive from the ſhare of *Zeyd*, a number of yards equivalent to half the apartment; becauſe, upon the actual legacy failing the bequeſt muſt be executed by means of the conſideration received in exchange for it; in the ſame manner as where a perſon bequeaths a ſlave who is afterwards killed; in which caſe the legacy muſt be executed from the compenſation received for his blood: (contrary to where the ſlave is *ſold*; for in this caſe the bequeſt has no connexion with the price received, but is completely annulled by the ſale; whereas a bequeſt is not annulled by a partition, as that is alſo a ſpecies of *ſeparation* of property.)—The argument of the two *Elders* is, that the teſtator has certainly meant to bequeath an article in which his property may be firmly and ſolidly eſtabliſhed by means of partition; for his apparent object is to bequeath an article which in every reſpect may be productive of uſe; and that can be accompliſhed only by *partition*, as the uſe of a thing of which the property is ſhared in common with another is defective.—Where, therefore, the apartment bequeathed, upon a partition being made, falls to the ſhare of *Zeyd*, and his property in it is firmly eſtabliſhed *in toto*, his bequeſt of it takes complete effect. With reſpect to what is urged by *Mohammed*, that "partition is a ſort of *exchange*," it may be replied that the quality of *exchange*, in partition, is merely ſecondary, the original deſign of partition being, that each may enjoy the complete uſe of his own ſhare, (whence it is that the parties may be *compelled* to a partition of it;) according to which original deſign the apartment may be ſaid to have been in the poſſeſſion of *Zeyd* from the beginning. Where, on the other hand, it falls to the ſhare of *Bicker*, in that caſe the bequeſt of *Zeyd* takes effect from the ſhare allotted to him, to the quantity of cubits of the whole apartment; becauſe that quantity is the conſideration for the apartment, as has been already ſtated;—or, becauſe the bequeſt muſt be thus conſtrued, that the teſtator, by the *apartment*, merely meant a ſum of meaſurement equivalent thereto, in order that his deſign may be anſwered as far as the nature of the caſe admits*;—or elſe, becauſe the teſtator may have meant that the apartment ſhould go to *Omar*, provided it fell to his ſhare upon a partition, or otherwiſe a ſum of meaſurement equivalent to it;—this caſe being analogous to that of a man ſuſpending the freedom of a child born of his female ſlave, and the divorce of his wife, upon the circumſtance of his female ſlave bearing the child, (by ſaying, "upon my female ſlave being delivered of her firſt-born child, ſuch child is free and my wife divorced;") which is conſtrued to mean *any* child, to produce the divorce, and a *living* child to produce the emancipation.—‡ It is to be obſerved that where the apartment does not fall to the ſhare of *Zeyd*, if the extent of the whole houſe be one hundred cubits, and that of the apartment ten, *Mohammed* in that caſe is of opinion that the ſhare of *Zeyd* is to be divided into ten parts, of which nine muſt be given to the heirs, and one to *Omar*;—whereas the two *Elders* hold that the ſhare of *Zeyd* is to be divided into five parts, of which one muſt be given to *Omar*, and four to the teſtator's heirs. (With reſpect to what is mentioned in the *Hedáya*, that [according to the two *Elders*] "the ſhare of the teſtator is divided into *eleven* parts, of which two are given to *Omar* and nine to the heirs," it is a miſtake, for this mode of diviſion obtains only in caſes of *declaration* or *acknowledgment*.) It is here proper to remark that if an *acknowledgment* be made under the ſame circumſtances as are here ſtated, as if *Zeyd* ſhould declare an apartment of the extent of ten cubits, in a houſe of one hundred cubits, which he poſſeſſed in common with another, to be the property of *Omar*, ſome ſay that in this caſe alſo a difference of opinion obtains between the two *Elders* and *Mohammed*; whilſt others maintain that there is no difference of doctrine in this point, *Mohammed* alſo holding (in common with the two *Elders*) that in caſe the ſaid apartment fall to the ſhare of *Zeyd*, it goes complete to the acknowledgee [the perſon in whoſe favour the acknowledgment is made,] or otherwiſe, that the ſhare of the acknowledger is divided into eleven parts, of which two are given to the acknowledgee and nine to the acknowledger. The reaſon of this laſt adjuſtment is that the acknowledger here makes his acknowledgment to this purpoſe; "the houſe which, excluſive of that apartment, meaſures "ninety cubits, is the joint property of me and my partner,—of which "forty-five appertain to me;" and the acknowledgee claims ten cubits from the fifty which fall to the ſhare of the acknowledger. The fifty cubits therefore, which conſtitute a moiety of the houſe, are divided between the acknowledger and acknowledgee in this way, that the acknowledgee takes in the proportion of ten cubits, and the acknowledger in the proportion of forty-five, and accordingly that moiety of the houſe is diſpoſed of in eleven ſhares. It is otherwiſe with reſpect to a bequeſt, as before ſtated; for there this mode of diviſion cannot obtain, as the teſtator, in making his bequeſt, cannot be ſuppoſed to have ſaid "this houſe, except ſuch an apartment, is in common between me "and my partner," ſince if he were to ſpeak thus his bequeſt would be null, as the bequeſt of another's property is not approved. *Mohammed* further remarks that the difference between a bequeſt and an acknowledgment is this, that an acknowledgment affecting the property of another is approved, (inſomuch that if a perſon were to declare that "ſuch a thing, held by *Zeyd*, is the property of *Amroo*," and this perſon ſhould at any time thereafter become proprietor of that thing, he is directed to deliver it up to *Amroo*,) whereas a bequeſt of the property of another is utterly null and void, inſomuch that if a perſon bequeath any thing belonging to another, and afterwards become

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* An objection and reply are here ſtated, which the tranſlator prefers inſerting in a *note* in order to avoid an interruption of the context.

"OBJECTION.—If ſuch be the teſtator's meaning, why is the particular apartment given to *Omar* when it falls to the ſhare of *Zeyd*?"

"REPLY.—The apartment in queſtion is made the legacy, where it falls to the ſhare of *Zeyd*, for this reaſon, that in thus ſettling the matter a regard is paid to the two chief diſtinguiſhing circumſtances of the caſe, namely, the quantity or ſum [of the thing bequeathed,] and the inveſtiture [of the legatee] with the actual apartment:—and as, where the apartment falls to the lot of *Bicker*, it is impoſſible to pay attention to *both* circumſtances, it accordingly in that caſe ſuffices to pay attention to the firſt."

come proprietor of that thing, and die, ſtill the bequeſt is of no

The validity of a bequeſt of money belonging to another reſts upon the proprietor's conſent.

IF a perſon bequeath a thouſand *dirms* that belong to another, the execution of the bequeſt reſts entirely on the conſent of the proprietor, and it is optional in him to confirm it, or not, as he pleaſes. If he, therefore, after the death of the teſtator, give his conſent, the bequeſt is valid, and the money paid to the legatee accordingly. This conſent, however, is purely voluntary and gratuitous; whence if, after having ſignified it, the perſon refuſe to pay the money, it is lawful.

An heir, after partition of the eſtate, ack a

IF two ſons make a partition of their father's eſtate, and one of them then declare that "his father had bequeathed a third of his property to *Zeyd*," he [the declarer] muſt in that caſe make over a third

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* There being here a conſiderable deviation from the original text, and alſo ſome confuſion in the ſubject, (owing to the quantity of extraneous matter introduced by the *Perſian* commentators,) the tranſlator thinks it his duty to give the whole paſſage literally, from ‡ to *, as ſtated in the *Arabic* copy.—"Where the apartment falls to the other partner, "not the teſtator, the houſe meaſuring one hundred cubits, and the apartment ten cubits, "the teſtator's ſhare is divided into ten lots, nine for the heirs, and one for the legatee.— "This is according to *Mohammed*; for he ſuppoſes the legatee to multiply a moiety of the "apartment by five, (the number of cubits it meaſures,) and the heirs the half of the remainder of the houſe by forty-five; and thus the whole will compoſe five lots [of ten "cubits,] which makes ten [lots of five cubits.]—But according to the two [*Elders*] it is "divided into eleven lots; becauſe they ſuppoſe the legatee to multiply by ten, and the "heirs by forty-five; and thus the whole compoſes eleven lots, two for the legatee, and "nine for the heirs.—If declaration [*acknowledgment*] be put in the place of bequeſt, it is "ſaid there is a difference of opinion:—but it is alſo ſaid that there is no difference on the "part of *Mohammed*,—the only difference, according to him, being that an acknowledgment affecting the property of another is valid,—inſomuch that he who makes an acknowledgment concerning property poſſeſſed by another in favour of a different perſon, and "afterwards obtains poſſeſſion of the ſame, muſt be directed to give it up to the acknowledgee;—whereas a bequeſt affecting the property of another is null; inſomuch that if "the teſtator ſhould by any means afterwards become poſſeſſed of that property, and then "die, ſtill his bequeſt does not paſs," [is of no effect.]

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legatee *his* proportion of ſuch bequeſt.

of his portion to *Zeyd.* This proceeds upon a favourable conſtruction. *Mohammed*, on the contrary, maintains that the declarer is to make over an *half* of his portion to *Zeyd*; (and ſuch is what analogy would ſuggeſt;) becauſe when this ſon made the declaration that *Zeyd* was entitled to a third, he then in fact declared *Zeyd* to be entitled to as much as himſelf, whence it is requiſite that he make over a moiety of his portion to him, in order that both may be placed on an equality. The reaſon, however, for a more favourable conſtruction in this particular is, that the ſon has here made a declaration, in favour of *Zeyd*, of one third, affecting the whole eſtate indefinitely; and as the whole eſtate has gone in two portions, each falling to each ſon reſpectively, it follows that the ſon has made his declaration in favour of *Zeyd* with reſpect only to a *third* of his own portion.

A female ſlave who (previous to the partition of the eſtate) produces a child.

If a perſon bequeath a particular female ſlave to *Zeyd*, and after his death the ſaid ſlave bring forth a child, the legatee is in that caſe entitled to both the mother and child, provided, however, that their added value do not exceed a third of the eſtate, for then *Zeyd* is to receive the female ſlave, as far as a third of the eſtate, and if her value be ſhort of the third, the reſidue muſt be made up to him from the value of the child. This is according to *Haneefa.* The two diſciples, on the contrary, maintain that in this caſe the legatee is to receive to the amount of a third of the property from both the mother and child, in proportion to their reſpective values. Thus if the value of the mother be three hundred *dirms*, that of the child the ſame, and the other effects amount to ſix hundred *dirms*, the whole forms an eſtate of one thouſand two hundred *dirms*, of which a third is four hundred. Now *Haneefa* holds that in this caſe the female ſlave muſt be made over to the legatee in payment of three hundred *dirms*, and he alſo receives one hundred deducted from the value of the child;—whereas the two diſciples maintain that he is entitled to a deduction of two thirds from the value of each. The argument of the two diſciples is, that the child is virtually included in the bequeſt, from its being (as it were) a dependant on the original ſubject of it, and that therefore the bequeſt muſt be executed proportionally from both, without preference or diſtinction.—The argument of *Haneefa* is, that the mother is the original ſubject of the bequeſt, and the child only a dependant; and the dependant cannot obſtruct the original. If, moreover, the bequeſt were executed equally from both, it induces this conſequence, that a part of the legacy is ſplit off from the original ſubject, which is unlawful. All that is here advanced proceeds on a ſuppoſition of the birth of the child happening prior to the partition, and the acceptance of the legatee; for if it ſhould take place afterwards, the child inconteſtibly belongs to him, as being the offspring of his property; for his right in the ſlave was fully and completely eſtabliſhed by the partition.

## SECTION.

### *Of the Period of making Wills.*

Gratuitous acts, of immediate operation, if executed upon a deathbed, take effect to the extent of one third of

IT is to be obſerved, as a general rule, that where a perſon performs, with his property, any gratuitous deed, of immediate operation, (that is, not reſtricted to his death,) if he be in health at the time, ſuch deed is valid to the extent of all his property,—or, if he be ſick [*], it takes effect to the extent of one third of his property; and where a perſon performs ſuch deed, with his property, reſtricted

to

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[*] Arab. *Mareez*.—This term (as has been already obſerved) literally means ſick. In the language of the LAW, however, it is always uſed to ſignify a *dying* perſon,—that is, "ſick *of a mortal illneſs*;" and in that ſenſe it is invariably to be underſtood throughout this book.

the property only.

to the circumſtance of his deceaſe, it takes effect to the extent of a third of his property, whether, at the time, he be ſick or in health. If, on the contrary, a perſon make an acknowledgment of debt, ſuch acknowledgment is of effect to the whole extent of his property, notwithſtanding it be made during ſickneſs, as this is not a *gratuitous* deed. Still, however, a declaration of this nature, made in health, precedes a declaration of the ſame nature made in ſickneſs. It is alſo to be remarked, that a ſickneſs of which a perſon afterwards recovers is conſidered, in LAW, as health *.

An *acknowledgment* on a deathbed is valid in favour of a perſon who afterwards becomes an heir; but not a *bequeſt* or *gift*,

If a ſick perſon make an acknowledgment of debt in favour of a ſtrange woman, or make a bequeſt in her favour, or beſtow a gift upon her, and afterwards marry her, and then die, the acknowledgment is valid; but the bequeſt or gift is void; for the nullity of an acknowledgment in favour of an heir depends on the perſon having been an heir at the time of making it, whereas the nullity of a bequeſt in favour of an heir depends on the legatee being ſo at the time of the teſtator's death, as has been already explained; and as the woman was not an heir at the time of the acknowledgment, but had become ſo [by marriage] at the time of the teſtator's death, the acknowledgment is therefore valid, but the bequeſt is void; and ſo likewiſe the gift, it being ſubject to the ſame rule as the bequeſt.

neither is an *acknowledgment* ſo made the of , previous to the deed.

If a ſick perſon make an acknowledgment of debt due by him to his ſon, or make a bequeſt in his favour, or beſtow a gift upon him, at a time when the ſon was a Chriſtian, and he [the ſon] afterwards, previous to his father's death, become a *Muſſulman*, all thoſe deeds of acknowledgment, gift, or bequeſt, are void: the bequeſt and the gift, becauſe of the ſon being an heir at the death of his father, as above explained; and the acknowledgment, becauſe, although the ſon, on account of the bar, (namely difference of religion,) was not an heir at the time of making it, ſtill the *cauſe* of inheritance (namely conſanguinity) did then exiſt, which throws an imputation on the father, as it ingenders a ſuſpicion that he may have made a *falſe* declaration, in order to ſecure the deſcent of part of his fortune to his ſon. It is different in the caſe of marriage, as above ſtated; for *there* the cauſe of inheritance, (namely, marriage,) occurred poſterior to the acknowledgment, and had no exiſtence previous thereto; for ſuppoſing the marriage to have exiſted at the period of making the acknowledgment, and that the wife, being then a chriſtian, ſhould afterwards, before the huſband's death, become a *Muſſulman*, in that caſe it [the acknowledgment] would not be valid.

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* This paſſage has no place in the *Arabic* copy. It has been introduced in the *Perſian* verſion as a *premiſs* neceſſary to the completely underſtanding of what follows.

Such acknowledgment, gift, or bequeſt, in favour of a ſon, being a ſlave, who afterwards becomes free previous to the father's deceaſe, is ne void

If a ſick perſon make an acknowledgment of debt due by him to his ſon, who is an abſolute ſlave or *Mokatib*,—or beſtow a gift upon him, or make a bequeſt in his favour, and the ſon ſhould afterwards, before the death of his father, obtain his liberty, in that caſe none of theſe deeds are valid, becauſe of the reaſons explained in the preceding example. It is related, in the *Mabſoot*, under the head of *Acknowledgments*, that "the acknowledgment of a ſick perſon in favour "of his ſon who is a ſlave is valid, provided the ſlave be not in debt; "for in that caſe the acknowledgment is, in effect, in favour of the "maſter, who is a ſtranger; and an acknowledgment in favour of a "ſtranger is valid;—whereas, if the ſlave were involved in debt, "his father's acknowledgment in his favour would not be valid, as "in ſuch caſe it could not be conſtrued to be in favour of the maſter, "ſince an indebted ſlave is the proprietor of his own acquiſitions."—The *bequeſt* is, however, invalid, becauſe to eſtabliſh it regard muſt be paid to the time of the teſtator's death, and the ſon is at that time an heir, as being then free. With reſpect, indeed, to the *gift*, it is ſaid to be valid*, provided the ſlave be not indebted; becauſe a gift is

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* Probably meaning "in the *Mabſoot*."

an immediate transfer and inveſtiture; and as the ſon is at that period a ſlave, the gift is in effect in favour of his maſter: but if he be involved in debt the gift is invalid, as in that caſe he is maſter of his own acquiſitions, and a gift is conſidered as ſuch. According to the more commonly received authorities, however, the gift is void on either ſuppoſition; for as a gift during a mortal illneſs is equivalent to a bequeſt, it is therefore invalid, in the ſame manner as a bequeſt would be which was made in favour of the ſame perſon.

Rule for aſ-

Paralytic, gouty, or conſumptive perſons, where their diſorder has continued for a length of time, and they are in no immediate danger of death, do not fall under the deſcription of ſick [*Mareez,*] whence deeds of gift, executed by ſuch, take effect to the extent of their whole property; becauſe, when a long time has elapſed, the patient has become familiarized to his diſeaſe, which is not then accounted as *ſickneſs*. (The length of time requiſite, by its lapſe, to do away the idea of *ſickneſs* in thoſe caſes is determined at one year; and if after that time the invalid ſhould become bedridden, he is then accounted as one recently ſick.) If, therefore, any of the ſick perſons thus deſcribed make a gift in the beginning of their illneſs, or after they are bedridden, ſuch gift takes effect from the third of their property, becauſe at ſuch a time there is apprehenſion of death, (whence medicine is then adminiſtered to them,) and therefore the diſorder is then conſidered as a *deathbed illneſs*.

CHAP.

# CHAP. III.

## Of Emancipation upon a Deathbed; and of Wills relative to Emancipation.

IF a perſon, on his deathbed, emancipate a ſlave, or give a portion of his property to another, or make a *Mobabàt* *, in purchaſe or ſale, by buying an article at an *over*-value, or ſelling it at an *under*-value, —or concerning the dower, hire, or ſo forth,—or become ſecurity for another, all theſe deeds are conſidered in the light of a bequeſt, and take effect to the extent of a third of his eſtate.

take effect to the extent of a third of the property.

IF a ſick [dying] perſon make a *Mobabàt* [of any kind †,] and then emancipate his ſlave, and [after his death] the third of his property ſuffice not for both, in that caſe *Haneefa* is of opinion that the *Mobabàt* has the preference;—in other words, if, after executing the *Mobabàt*, any part of the third remain, the ſlave is, without recompence, free in that proportion, and muſt perform emancipatory labour for the remainder of his value,—or for his *full* value, if *nothing* re-

Caſe of a *Mobabàt*, and

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t literally ſignifies *connivance*.—Thus, a purchaſer or ſeller who gives more, or takes leſs, for an article than its real value, *connives* at the loſs.—This term, therefore, is not confined to ſale, but extends to every act in which the perſon connives at his own loſs, ſuch as (in the caſe of dower) paying the wife more than ſhe is entitled to, or (in a caſe of hire) paying the hireling more than he had agreed for.—The tranſlator preſerves the original term, as it is purely *technical*.—The *Arabic* text expreſſes this paſſage with great brevity: "Whoſo frees his ſlave in ſickneſs, or ſells, or connives, or gives, it is law- , and recognized to the extent of a third of his property."

That is, "*execute any contract, or perform any act, by which he ſuſtains a wilful loſs.*"

main.—If, on the contrary, the perſon firſt emancipate the ſlave, and then make the *Mohabàt*, the ſlave, and the perſon in whoſe favour the *Mohabàt* is made, are upon a perfect equality, and each takes from the third of the eſtate in proportion to his right;—as, for inſtance, the ſlave is emancipated from the third of the eſtate in the proportion of his value, and performs emancipatory labour for the remainder,—and the perſon in whoſe favour the *Mohabàt* is made takes in the proportion of his *Mohabàt*, and makes good the remainder.—The two diſciples maintain that the emancipation has the preference in both caſes, for it is the ſtronger, inaſmuch as it does not admit of retractation. *Haneefa*, on the contrary, maintains that *Mohabàt* is the ſtronger, as being interwoven in a compact of exchange: contrary to emancipation, for in that there is no exchange. If, therefore, the *Mohabàt* be firſt made, it ſets aſide the emancipation, becauſe of the comparative weakneſs thereof;—whereas, if the emancipation be firſt made, it obſtructs the *Mohabàt*, becauſe of its priority, but ſtill does not ſet it aſide, as emancipation is incapable of ſetting aſide a *Mohabàt*;—whence, in this inſtance, both are placed upon a footing. According, therefore, to this difference of opinion, if a perſon be poſſeſſed of two ſlaves, one valued at two hundred *dirms*, and the other at one hundred, and firſt ſell the former by a *Mohabàt* ſale, for one hundred *dirms*, and afterwards emancipate the latter, and die, leaving no other property, in that caſe, according to *Haneefa*, the *Mohabàt* is executed in full, and the other ſlave is required to perform emancipatory labour to the full amount of his value;—whereas if, on the contrary, the emancipation precede the *Mohabàt*, then a third of the value of both ſlaves, amounting to one hundred *dirms*, is divided equally between both parties, (that is, between the emancipated ſlave and the perſon in whoſe favour the *Mohabàt* was made;) and accordingly, a moiety of the ſlave is emancipated without any conſideration, and he is to perform emancipatory labour for fifty *dirms* more, being the remaining half of his value;—and fifty *dirms* are deducted, in the manner of a *Mohabàt*, from the ſlave ſold by *Mohabàt*, and his price is then one hundred and fifty *dirms*, for which the purchaſer is accountable:—but the two diſciples maintain that the ſlave is completely free in both inſtances. In the ſame manner, if a perſon, upon his deathbed, firſt ſell a ſlave by *Mohabàt*, then emancipate a ſecond, and afterwards ſell a *third* by *Mohabàt*, and have no other property beſides theſe three ſlaves, in that caſe, according to *Haneefa*, the half of the third of the property muſt be allowed to the perſon in whoſe favour the firſt *Mohabàt* was made, and the remaining half of the third is equally divided between the emancipated ſlave and the one in whoſe favour the laſt *Mohabàt* was made;—whereas, had he firſt emancipated one, then ſold the ſecond by *Mohabàt*, and afterwards emancipated the third, in that caſe one third of the eſtate would be divided into two equal ſhares, of which one would be given to the perſon in whoſe favour the *Mohabàt* ſale was made, and the other equally divided between the two emancipated ſlaves:—but the two diſciples maintain that in both caſes the emancipation is to be preferred.

*Mohabàt* or in their execution, the actual queſts.

It is to be obſerved, as a ſtanding rule*, that where a perſon bequeaths ſeveral legacies, and the third of his property ſuffices for the payment of the whole, they are all carried into execution without a preference being given to either. But if, beſides theſe legacies, he ſhould in his laſt illneſs emancipate a ſlave, or direct the emancipation to take place after his death, or ſell ſomething by *Mohabàt*,—in that caſe both kinds of emancipation, as well as the *Mohabàt*, are preferred to the legacies, and muſt therefore be firſt executed from the third of the eſtate, and the remainder (if there be any) is then divided equally among the legatees.

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* Arab. *Aſl*; literally, a *root*; meaning (in this place) a principle or ground of deciſion in all parallel caſes.

The appro- of a be- to the emancipation of a ſlave is annulled by the ſubſequent loſs or failure of any of it;

tion of a ſum to the per-

If a perſon, on his deathbed, ſet aſide one hundred *dirms*, and will that "after his death the ſaid ſum be applied to the emancipation of "a ſlave," and one *dirm* of the number happen to be loſt, in that caſe *Haneefa* maintains that the will is annulled, and that the remaining ninety-nine *dirms* cannot be applied to the purpoſe of emancipating a ſlave. If, on the contrary, the perſon will that "the ſaid ſum be "appropriated to defray the expence of a pilgrimage to *Mecca*," in caſe the loſs or deſtruction of one *dirm* does not invalidate the will, but the remaining ninety-nine *dirms* are applied to the purpoſe preſcribed by the teſtator, by deputing a perſon from ſuch a diſtance as may enable him to reach *Mecca* by means of the ſaid ſum. (If alſo, in this laſt caſe, part of the ſum have been loſt or deſtroyed, and there remain a part after the return of the pilgrim, it muſt be reſtored to the heirs.) The two diſciples maintain that the will is valid in the former inſtance likewiſe, and the ninety-nine *dirms* applied to the emancipation of a ſlave, in the ſame manner as (in the other inſtance) to the performance of the pilgrimage. The argument of *Haneeſa* is that, in the former inſtance, the will directs the emancipation of a ſlave valued at one hundred *dirms*; and therefore, if it were executed with ninety-nine *dirms*, it would take effect in favour of a perſon different from the intended legatee, which is not lawful. It is otherwiſe with a bequeſt concerning pilgrimage, as pilgrimage is purely a religious duty, and religious duties appertain excluſively to God; and as God therefore is the legatee in this inſtance, a diminution of the ſum does not induce an execution of the will in favonr of any *other* then the legatee, ſince a pilgrimage for ninety-nine *dirms* is performed on behalf of God, as much as a pilgrimage for one hundred *dirms*. Some have obſerved that this difference of opinion between *Haneefa* and the two diſciples is founded on the different ſentiments they entertain with reſpect to the emancipation of a ſlave; the two diſciples holding it to be a religious act, in the ſame manner as the performance of a pilgrimage; and *Haneeſa* conſidering it as an act in favour of the ſlave alone.

(The compiler of the *Hedaya* remarks that this laſt opinion is approved.)

A emancipated on a ex- labour by the heirs aſſenting to his freedom.

If a perſon during his laſt illneſs emancipate a ſlave valued at one hundred *dirms*, and die, leaving two ſons and one hundred *dirms*, and the emancipated ſlave and his heirs give their conſent to the emancipation, the ſlave is not required to perform any emancipatory ſervice whatever, but is free without ſo doing; for although the manumiſſion was equivalent to a bequeſt in the proportion beyond a third of the emancipator's property, yet it is valid on the heirs aſſenting to it.

A bequeſt of emancipation, in favour of a ſlave, is nulled b be over in compenſation for an offence

If a perſon will that "his heirs emancipate his ſlave at his deceaſe," and the ſlave, after the death of the teſtator, commit an offence, and the heirs ſurrender him, as a compenſation, to the avenger of offence, the will is void; becauſe the ſurrender of him in compenſation for the offence is approved; for as the right of the teſtator muſt yield to that of the avenger of offence, the right of the legatee muſt conſequently yield to it likewiſe, ſince a legatee obtains his right in the legacy from the teſtator; and as, upon the ſlave being ſurrendered in compenſation for the offence, he paſſes out of the property of the teſtator, the will is void of courſe. If, on the contrary, the heirs prefer paying a redemptionary atonement, the will remains valid, and does not become void; (but in this caſe the redemptionary atonement falls entirely upon their property, as they have themſelves undertaken the payment of it;) and as the ſlave, by the payment of the redemption, is purified from the offence, the caſe is therefore the ſame as if he had not offended at all, and the will takes effect of courſe.

Wl heir and the legatee agree

If a perſon bequeath to another "a third of his property," and leave, among his other effects, a ſlave, and the legatee and heirs agree that the teſtator had emancipated the ſlave, but differ with reſpect been emanci-

credited with reſpect to the *date* of the

ſpect to the *time* of ſuch emancipation, (the legatee aſſerting that it was during his health, and the heirs, on the other hand, maintaining that it was during his ſickneſs,) in that caſe the word of the heirs muſt be credited, and the legatee is entitled only to what remains after the value of the ſlave is deducted from the third of the teſtator's whole property*; becauſe the legatee here pleads his title to a third of what remains after the emancipation of the ſlave, ſince manumiſſion granted during health does not ſtand as a bequeſt, (whence it is that it takes effect from the *whole* of the property,) and the heirs reſiſt his plea, aſſerting that the teſtator had emancipated the ſlave during ſickneſs; and as manumiſſion during ſickneſs is a ſpecies of bequeſt, and takes place of a bequeſt of a third of the property, the heirs are therefore *negators*; and as the aſſertion of a negator [the defendant,] upon oath, muſt be credited, the legatee is therefore entitled to nothing whatever; —unleſs there ſhould remain ſome exceſs in the third of the property over and above the value of the ſlave, in which caſe the legatee is entitled to ſuch exceſs; or, unleſs the legatee confirm his aſſertion by evidences, in which caſe he is entitled to a third of what remains of the whole eſtate after the emancipation of the ſlave.

Caſe of an

by the heirs.

If a perſon die, leaving no other property except one ſlave, the ſlave ſay to the heirs "your father, whilſt he was in "emancipated me," and another perſon ſay to them "your father "was indebted to me one hundred *dirms*," and the heirs credit both theſe aſſertions, (as, for inſtance, by replying to them *together*, "you "both ſpeak truly,") the ſlave is, in that caſe, required to perform emancipatory labour to the full extent of his value, according to *Haneefa*. The two diſciples, on the contrary, maintain that the ſlave is emancipated without performing any ſervice whatever, becauſe the proof of the debt and of the emancipation during health are eſtabliſhed, jointly, as the heirs have acknowledged both at the ſame time, and the emancipation of a ſlave during health does not induce the neceſſity of labour notwithſtanding the emancipator ſhould be involved in debt. The argument of *Haneefa* is, that the acknowledgment of the debt on the part of the heirs is ſtronger than that of the emancipation; becauſe the former is valid at whatever period it may have been contracted, and is diſchargable from the whole eſtate; whereas the latter, if performed during ſickneſs, is limited to a *third* of the eſtate; and ſuch being the caſe, it would follow that the emancipation is utterly annulled. As, however, emancipation, after having been made, does not admit of being *abſolutely* annulled, it is therefore *virtually* annulled, in this inſtance, by the impoſition of emancipatory labour.—The ſame difference of opinion ſubſiſts in the caſe where a perſon, dying, leaves one thouſand *dirms*, and one perſon aſſerts that the deceaſed owed him one thouſand *dirms*, and another, that he had depoſited one thouſand *dirms* in truſt with the deceaſed, and the heirs confirm both aſſertions at one and the ſame time; for in ſuch caſe the two diſciples are of opinion that both claims are upon an equal footing, and that the one thouſand *dirms* are therefore to be divided equally between the parties; whereas *Haneefa* maintains that the claim of the depoſitor is the ſtrongeſt, as his right relates to the identical *dirms* whilſt the creditor has only a general claim on the perſon.

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* Literally, "*is entitled to nothing whatever.*" The tranſlator renders the paſſage in a ſenſe, becauſe of the reſervation afterwards ſtated.

## SECTION.

### *Of Bequeſts for pious Purpoſes* [*].

In the execution of bequeſts to *ſundry* pious purpoſes, the *ordained* duties precede

If a perſon make ſeveral bequeſts, for the performance of ſundry religious duties, ſuch as *pilgrimage*, *prayers*, and ſo forth, it is requiſite to execute firſt ſuch as are abſolutely incumbent and ordained[†]; and this, whether the teſtator have mentioned them firſt or not; for the diſcharge of the *ordained* duties is of more importance than that of acts which are merely voluntary; and the law therefore ſuppoſes that the object of the teſtator was to begin with the performance of them. But if the ſeveral duties, the objects of the will, be all of the ſame importance, and of ſimilar force, and the third of the eſtate ſuffice not for the diſcharge of the whole, they muſt in that caſe be executed agreeably to the order in which they have been ſpecified by the teſtator, as it may be inferred that thoſe to which he gave the precedence were, in his opinion, the moſt urgent. *Tahâvee* maintains that alms are to be executed before pilgrimage. There is alſo one report from *Aboo Yooſaf* to the ſame effect. Another opinion reported from him is, that pilgrimage precedes alms; and ſuch is the opinion of *Mohammed.* The argument in favour of the firſt report is, that both are in an equally ſtrong degree enjoined by God: but yet alms, as being connected with the rights of mankind, muſt be preferred, the right of the individual preceding the right of God.—

unleſs all the purpoſes mentioned be of equal importance, in which caſe the arrangement of the teſtator muſt be followed,

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[*] Literally, "*of bequeſts to the rights of* God."

[†] Arab. *Farz:* a term applied to any thing enjoined as an indiſpenſable duty, and more particularly to the five *primary* duties; *purification*, *prayer*, *alms*, *faſting*, and *pilgrimage*.

The argument in ſupport of the ſecond report is, that the performance of pilgrimage, beſides the expenditure of money, requires alſo an exertion of the body; and as this is not the caſe with alms, pilgrimage has therefore precedence. Either of thoſe, however, is preferable to expiation, becauſe they have been in a greater number of inſtances, and in a ſtronger degree enjoined by GOD.—Again: expiations for murder, for *Zihár*, and for a broken vow, are preferable to *Sadka-fittir*, [charity given on the day of breaking faſt,] becauſe theſe expiations have been enjoined in the KORAN, whereas the latter has not. *Sadka-fittir*, on the other hand, is preferable to ſacrifice, becauſe it is an incumbent duty in the opinion of all our doctors, whereas a difference of opinion ſubſiſts with reſpect to the abſolute obligation of ſacrifice.

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IN the execution of all pious wills, where the objects of them are not incumbent duties, (ſuch as the erection of a moſque, of a receptacle for travellers, or of a bridge,) it is requiſite to follow the arrangement of the teſtator, ſince it may be inferred that he conſidered thoſe firſt mentioned as the moſt urgent. Lawyers, moreover, have remarked that if a perſon make ſeveral bequeſts, ſome for the performance of religious duties immediately enjoined by GOD, and others for benevolent purpoſes amongſt mankind, in that caſe a third of his property muſt be ſet aſide for the execution of them; and whatever may be the ſhare appropriated for the performance of the duties belonging to GOD, it muſt be applied agreeably to the order of arrangement, as already explained.—It is to be obſerved, alſo, that every different duty is to be conſidered in the nature of a diſtinct legacy; for, the object of each being the attainment of the goodwill of the ALMIGHTY, every ſeveral duty has an object in itſelf, and each is therefore to be conſidered in the nature of a legacy left to a different perſon.

Rules in be- [illegible] to the [illegible] mage.

If a perſon will that "the pilgrimage incumbent on him be performed on his behalf after his death," in that caſe the heirs muſt depute a perſon for this purpoſe from the city of the teſtator, and furniſh him with ſuch conveyances and equipments as are ſuitable to his [the teſtator's] rank; becauſe, being performed on his account, it muſt be executed in the ſame manner as if actually performed by himſelf. But if the property of the teſtator be inadequate to the expence of ſending a perſon from his own city, in that caſe a perſon muſt be ſent from ſome other nearer place, the diſtance of which from *Mecca* may be proportioned to the amount of the property.

If a perſon ſet out from his own city, with an intention of performing the pilgrimage to *Mecca*, and die on the road, after having willed that the pilgrimage be performed [by others] on his behalf, a perſon muſt be deputed for this purpoſe from the city of the teſtator, according to *Haneefa*; (and ſuch alſo is the opinion of *Ziffer*.) The two diſciples, on the contrary, maintain that a perſon is to be ſent from the place at which the teſtator had arrived in the proſecution of his intention;—and the ſame difference of opinion obtains where a perſon, having undertaken the pilgrimage on account of another, dies in the like manner on the road. The reaſoning of the two diſciples is, that the performance of a part of the journey, with the intention of having proſecuted the remainder, is in itſelf an act of piety, which is entitled to merit with God, and which annuls, in a proportionate degree, the obligation of the duty. Hence the pilgrimage is to be recommenced from the place in which he died, and which in effect has become (as it were) his city. It is otherwiſe where a perſon, with a view of *trading*, ſets out on a journey to *Mecca*, and dies on the way, after having willed that the pilgrimage be performed on his behalf; for in this caſe the part of the journey already performed not being an act of piety, there is an evident neceſſity for ſending a perſon from the city of the *teſtator*.—The reaſoning of *Haneefa* is, that the will muſt be conſtrued as meaning a commencement from the city of the teſtator, in order that the pilgrimage may be completely performed in the manner in which it was originally incumbent on the teſtator.

# CHAP. IV.

## Of Wills in favour of Kinſmen and other Connexions.

A bequeſt to "*a neighbour*" is in favour of the owner of the next adjoining houſe;

If a perſon make a bequeſt in favour of "his *neighbour* *, this, according to *Haneefa*, is a bequeſt to the perſon whoſe houſe is immediately adjoining to that of the teſtator. The two diſciples, on the contrary, maintain that it comprehends all the inhabitants of the vicinity, who belong to the ſame *moſque*, without any regard to the immediate adjunction of the houſes; ſince, according to the common acceptation of the word, they all fall equally under the deſcription of *neighbours*. The arguments adduced by *Haneefa* in ſupport of his opinion upon this point are twofold.—FIRST, the perſon whoſe houſe adjoins to that of the teſtator is in reality the *neighbour*.—SECONDLY, the modes and deſcriptions of *neighbourhood* are many; and as it would be impracticable to carry the will into execution with reſpect to the *whole*, it is therefore neceſſary to reſtrict it to him whoſe title, from

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* Specifying the legatee by *deſcription* only, without mentioning his name; as thus, "*I bequeath one thouſand* DIRMS *to* MY NEIGHBOUR."—In this and the ſucceeding examples, the effect turns entirely on the terms in which the teſtator ſignifies his bequeſt.

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and comprehends all competent deſcriptions of perſons.

the circumſtance of adjunction, is the moſt perfect and indiſputable. It is to be obſerved that the learned in the law are of opinion that every perſon may be included under this deſcription of neighbour, whether the proprietor of a houſe or not, or, whether a man or a woman, a *Muſſulman* or a *Zimmee*, the term *neighbour* being equally applicable to all theſe. *Haneefa* alſo holds that an abſolute ſlave, poſſeſſed of a houſe in the neighbourhood, is entitled to the benefit of the will.—The two diſciples hold a different opinion; becauſe, in ſuch caſe, the benefit of the will would ultimately revert to the maſter of the ſlave, who is not ſuppoſed to be a neighbour. The argument of *Haneefa* is, that the term *neighbour* applies indiſcriminately to all.

Rules in bequeſts to "the *As'hâr*" of the teſtator;

If a perſon make a bequeſt in favour of "his *As'hâr* *," all the relations of his wife within the prohibited degrees (ſuch as her *father*, *brother*, and ſo forth) are therein included; and likewiſe all the relations of his father's wife [his ſtep-mother] and of his ſon's wife [his daughter-in-law] within the prohibited degrees, as theſe all ſtand in the relation of *As'hâr* to the teſtator. This explanation of *As'hâr* has been followed by *Mohammed* and *Aboo Obeydah*. It is to be obſerved that all the kindred of the wife within the prohibited degrees are included in the bequeſt, notwithſtanding ſhe were, at the time of the death of the teſtator, in her *edit* from a reverſible divorce. But if the divorce was irreverſible, her relations are not to be included, as the exiſtence of that degree of relation entitled *As'hâr* depends on the actual exiſtence of the marriage at the time of the teſtator's death; and by an irreverſible divorce marriage is utterly annulled.

and to "his *Khatn*;"

If a man make a bequeſt in favour of "his *Khatn*," it is a bequeſt to the huſbands of his female relations within the prohibited degrees;

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* *As'hâr* is the plural of *Sehr*, (pronounced, in *Arabia*, *Dehr*,) which is a general term for all relations by *marriage*.

and in it are likewiſe included all the relations of theſe huſbands within the prohibited degrees, theſe alſo falling under the deſcription of *Khatn*.—(Some commentators remark, that this explanation is agreeable to the ancient cuſtom; but that in the preſent times *Khatn* comprehends only the huſbands, as above.)—It is alſo to be obſerved that in this reſpect freemen and ſlaves, and the near and the diſtant relations are all upon a footing, becauſe the term *Khatn* comprehends the whole of theſe.

and to his

If a perſon make a will in favour of his "relations" [*Akrabá* [*],] it is executed in favour of the neareſt of kin within the prohibited degrees, and failing of them, in favour of the next in proximity, and ſo on with reſpect to the reſt within the prohibited degrees, in regular ſucceſſion. The will, in this caſe, includes two or more; but the father, mother, or children of the teſtator are not comprehended in it. This is the opinion of *Haneefa*. According to the two diſciples, the will includes only ſuch as are deſcended from the moſt diſtant progenitor of the teſtator, profeſſing the *Muſſulman* faith.—(Concerning the meaning of "the moſt diſtant progenitor *profeſſing the faith*," there is a difference of opinion; ſome maintaining that this applies to the remoteſt anceſtor who actually embraced the faith, and others alleging that it extends to the remoteſt anceſtor who may have known of the exiſtence of the faith, although he himſelf may not have acceded to it; as is exemplified in the caſe of *Aboo Tálib*, who, although he underſtood the *Muſſulman* faith, never embraced it.) The argument of the two diſciples is, that the term *relations* being in general applied to all of the *ſame blood*, the will therefore extends to all ſuch as fall under this deſcription, to whatever degree removed. The arguments of *Haneefa* are that legacies are a ſpecies of inheritance; and as, in inheritance, the arrangement here deſcribed is obſerved with reſpect to the heirs, it is alſo obſerved in the payment of legacies.—As, moreover, the plural term [*Akrabá*] mentioned in inheritance means *two*, ſo likewiſe in bequeſt *.—Beſides, the object of the teſtator, in his bequeſt, is, to compenſate for his deficiences, during life, with reſpect to the *ties of kindred* †, which affects only his relations within the prohibited degrees. The parents or children, moreover, are not ſtyled relations, [*Akrabá*,] inſomuch that if a perſon were to call his father "*his* RELATION," [*Kareeb*,] he would be conſidered as denying his parentage. The reaſon of this is that, in common uſage, by the term relation [*Kareeb*] is underſtood one related to a perſon by means of another: but the relation of parent and child is perſonal, and not by means of another.—In ſhort, according to *Haneefa*, the will in queſtion is reſtricted, in its operation, to the prohibited relations of the teſtator; whereas, according to the two diſciples, it extends to [all the deſcendants of] the moſt diſtant progenitor profeſſing the faith;—whilſt *Shafeï* maintains that it is confined ſolely to the teſtator's father [and his offspring.]

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[*] *Akrabá* is the plural of *Kareeb*, and ſignifies (collectively) *kindred*.

If a perſon, having two paternal and two maternal uncles, make a will in favour of "his relations," [*Akrabá*,] it is in favour of the *paternal* uncles only, according to *Haneefa*, he holding that regard is to be paid to the order of relationſhip;—whereas, according to the two diſciples, all the four uncles are included, they holding that no regard is to be paid to the order of relationſhip. If, on the other hand, the teſtator have only one paternal and two maternal uncles, the half of the legacy, in that caſe, goes to the paternal uncle, and the other half to the two maternal uncles, out of attention to the

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[*] Here is ſomething like a contradiction; for it was before ſaid that "the will includes "two *or more*." This, however, is not to be taken as excluding any number *above* two, but merely as comprehending the *dual* as well as any higher number.

[†] Arab. *Sillá Rihm.*—It is a technical term, comprehending, in its application, the kindred *within the prohibited degrees only.*

plural number, which, in bequeſts, comprehends *two*, (as before obſerved;) for as, if there were *two* paternal uncles, the whole legacy would go to them, it follows that where there is *one* only, he gets no more than an half, and the other half goes to the two maternal uncles. It would be otherwiſe if the perſon had expreſſed his bequeſt for "his *kinſman*[*];" for in this caſe the whole legacy would go to the paternal uncle, and nothing whatever to the two maternal uncles; becauſe, as the term *kinſman* expreſſes a *ſingular*, not a *plural* number, the paternal uncle therefore takes the whole, he being next of kin.—If (in the caſe of a bequeſt to "*relations*") the teſtator have a paternal uncle only, [and no maternal uncles,] he is entitled to no more than a moiety of the third of the eſtate; for as, if there had been *two* paternal uncles, they would have had the whole between them, one conſequently gets only an half.—If, on the contrary, he have a paternal uncle and aunt, and a maternal uncle and aunt, the legacy goes in equal ſhares between the paternal uncle and aunt, both being related to the teſtator within an equal degree of affinity,—and their connexion being of a ſtronger nature than that of the *maternal* uncle or aunt.—A paternal aunt, moreover, although ſhe be not entitled to inherit, is nevertheleſs capable of ſucceeding to a legacy,—in the ſame manner as holds with reſpect to a relation who is a *ſlave* or an *infidel*.—It is to be obſerved that, in all theſe caſes, if the teſtator have no prohibited relation, the bequeſt is null, becauſe it is reſtricted, in its operation, to thoſe within the prohibited degrees, as before noticed.

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IF a perſon make a bequeſt "to the *Ahl*[†] of ſuch an one," it is a bequeſt to the wife of the perſon mentioned, according to *Haneefa*.

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[*] Arab.

[†] The word *Ahl*, in its moſt common acceptation, denotes a *people* or *family*, as *Ahl Iran*, "the people of *Perſia*,"—*Ahl-nee*, "my family."—(This and ſeveral ſucceeding examples turn entirely upon the meaning of the terms uſed by the teſtator.)

The two diſciples, on the contrary, maintain that the bequeſt comprehends every individual of the family, entitled to maintenance from that perſon, ſuch being (with them) the common import of the word. The argument of *Haneeſa* is that *Ahl,* in its literal ſenſe, ſignifies a wiſe, a proof of which is drawn from this ſentence of the KORAN, "*Moſes* WALKED WITH HIS *Ahl,*" [wife,] (whence alſo the common mode of expreſſion "ſuch a perſon made *táàhul* [married] in a "particular city;")—and as the word *Ahl,* in its literal ſenſe, means a wife, it follows that whenever it is uſed abſolutely it muſt be reſolved into its *literal* ſenſe, which is the *true* one.

(or of the *houſe* of a particular perſon;)

IF a perſon make a bequeſt "to the *Ahl* of the houſe of ſuch an "one," the father and grandfather of the perſon named are included in ſuch bequeſt, as well as all the deſcendants from the remoteſt progenitor, on the paternal ſide, profeſſing the *Muſſulman* faith; - and if a perſon make a bequeſt "to the *Al* of ſuch an one," it is a bequeſt "to the *Ahl* of his houſe," the term *Al* applying to the tribe from which he is deſcended.

IF a perſon make a bequeſt "to the *Ahl* of ſuch a perſon's *Niſb* "[race] or *Jins*" [generation,]—by the former is underſtood all thoſe deſcended from his anceſtors in general,—but by the latter thoſe only deſcended from the *paternal* ſtock, not from the *maternal,* becauſe men are ſaid to be of the generation of their *fathers,* not of their *mothers.*—It is otherwiſe where the term *Kirràbit* [affinity] is uſed; for that appertains both to father and mother.

or to the *orphans, blind, lame,* or *widows,* of a

IF a perſon make a bequeſt "to the orphans,—the blind,—the "lame,—or the widows,—of the *race* * of ſuch an one,"—and the individuals of the race named can be enumerated, the bequeſt includes particular *race*;

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* Arab. *Binnee.* It is an irregular plural from *Ibn,* "a ſon," and expreſſes a *generation* or *tribe.*

them all indiſcriminately, whether rich or poor, males or females; for the execution of the bequeſt is practicable in this inſtance, becauſe of the aſcertainment of the legatees.—(It is to be obſerved that, concerning the expoſition of the expreſſion "if they can be enumerated," there is a difference of opinion; for, according to *Aboo Yooſaf*, this phraſe comprehends "as many as can be counted without the aid of written calculations," whereas *Mohammed* holds that it extends no farther than to *one hundred*, any greater number being conſidered as beyond enumeration. Some, on the other hand, allege that the determination of this point reſts entirely with the *Kázee*, and decrees paſs accordingly.)—But if the individuals of the race named be incapable of enumeration, the *poor* only are in that caſe included in the bequeſt, not the *rich*; for it [the bequeſt] is of a pious nature, and the object of it (namely, the goodwill of GOD) is beſt attainable by removing the wants of the poor. Beſides, as the very deſcriptions uſed indicate a degree of want and diſtreſs in the legatee, it is therefore proper to admit this to have been the teſtator's meaning. It is otherwiſe where a perſon makes a bequeſt "to the *youths* (or the "*virgins*) of a particular race," who are innumerable; for in ſuch caſe the bequeſt is void; becauſe, as the deſcription uſed does not indicate want, the words of the teſtator cannot be conſtrued to apply to the *poor*: neither can the bequeſt poſſibly hold valid in favour of all the individuals of the claſs named, ſince, as they are not to be enumerated, it is impracticable to define them, and a bequeſt to unknown legatees is null,—for bequeſt is an act of endowment, and it is impoſſible to endow perſons unknown. It is to be obſerved that, in the caſe of bequeſts "to the *poor* or *diſtreſſed*," the legacy muſt be paid to at leaſt *two* paupers, two being the ſmalleſt number of plurality in bequeſt, as was before ſtated.

or

IF a perſon make a bequeſt "to the race of ſuch an one," in that caſe, according to the two diſciples, and alſo according to the firſt opinion of *Haneefa*, the women of the ſaid race are included, the plural term *Binnee* extending to females as well as males. *Haneefa*, however, afterwards retracted this opinion, and maintained the males of the race only to be included, not the females; becauſe the term *Binnee* applies to men *literally*, but to women only *metaphorically*; and a word muſt be taken in its *literal* not its *figurative* acceptation. It is otherwiſe where "*the race of ſuch a perſon*" is the proper name of any particular tribe; for in that caſe the bequeſt includes the women alſo, as the term *Binnee*, in ſuch inſtance, comprehends the females of the tribe along with the males,—in the ſame manner as the general expreſſion *Benni-Adim* [the ſons of *Adam*,]—whence the bequeſt includes the freedmen, the ſworn confederates [*Haleefs*,] the ſlaves, and the *Mawalàt* confederates of the tribe named.

or to the *awlàd* of a particular race.

If a perſon make a bequeſt "to the children [*awlàd*] of the race "of ſuch an one,"—the males and females have an equal right in ſuch bequeſt, as the term *awlàd* comprehends the whole.

A bequeſt to the heirs of a particular perſon is executed agreeably to the laws of inheritance.

If a perſon make a bequeſt "to the *heirs* of ſuch an one," the legacy is in that caſe divided among the heirs of the perſon named, in the manner of an inheritance, a male getting as much as two females; becauſe there is reaſon to imagine that the object of the teſtator, in uſing the word heirs, was, that the ſame diſtinction might be obſerved in the partition of the legacies as obtains in the caſe of inheritance.

Caſe of a be- [illegible] the [illegible] of the teſtator.

If a perſon make a bequeſt "to his *Màwlas* *," and he have ſome *Màwlas* who had emancipated him, and others whom he had emancipated, the bequeſt is void; becauſe the term *Màwla* partakes of two different meanings, an *emancipator*, and a *freedman*, and it cannot be diſcovered which of theſe the teſtator intended. Neither can the intention be conſtrued to comprehend both; becauſe a word bearing a double meaning cannot be uſed in more than *one* of its ſenſes at a time; and as it is unknown which ſenſe the teſtator meant it in, the legatee is therefore uncertain; and any uncertainty concerning the legatee annuls the bequeſt. (In ſeveral of the books of *Shafeï* it is recorded that the bequeſt is conſtrued in favour of all the *Màwlas*, both the emancipators and the emancipated, as the term uſed applies to both.) It is to be obſerved that where the term *Màwla* is mentioned, in bequeſt, it comprehends every one whom the teſtator may have actually emancipated, whether in health or in ſickneſs; but not his *Modabbirs* or *Am-Walids*, as their emancipation does not take place until after his death, and his bequeſt is in favour of ſuch only as are free *previous* to that event. *Aboo Yooſaf* maintains that a *Modabbir* or *Am-Walid* is alſo included, becauſe, although theſe be not free previous to the teſtator's deceaſe, ſtill as a *cauſe* of freedom has taken place, and is eſtabliſhed in them, they may be ſaid to have been emancipated.— In this bequeſt is alſo included any ſlave of the teſtator to whom he may have ſaid, " you are free if I beat you not before my death;" (provided he did not afterwards beat him;) becauſe the ſlave is in this caſe free before the teſtator's deceaſe, and from the time that his ſtrength and power of beating failed him. If the teſtator have *Màwlas* whom he had emancipated, and alſo the children of thoſe *Màwlas*, and likewiſe *Màwlas* by *Mawalât* *, his freedmen *Màwlas* and their children are included in the bequeſt, but not his *Màwlas* by *Mawalât*. It is recorded from *Aboo Yooſaf*, that thoſe laſt are likewiſe included, and that all thoſe three deſcriptions equally participate in the bequeſt, as the term *Màwla* comprehends the whole. *Mohammed* argues that *Màwla* is a term which partakes of two different meanings; but a word of double meaning cannot be uſed in more than one ſenſe at a time; and as emancipation is an abſolute and unretractable act, and a contract of *Mawalát* may be reſcinded at pleaſure, a *Màwla* by manumiſſion has precedence of a *Màwla* by *Mawalát*, and thoſe are conſequently included in preference. But the *Màwlas* of the teſtator's *Màwlas** are not included in the bequeſt, which relates only to the *Màwlas* of the teſtator, not to thoſe of another. It is otherwiſe with the children of the teſtator's *Màwlas*; for they ſtand related to the teſtator becauſe of their freedom proceeding from him. It is alſo otherwiſe where the teſtator has no *Màwlas* by manumiſſion, nor children of thoſe *Màwlas*; for in that caſe the *Màwlas* by *Mawalàt* are included in the bequeſt, as the term *Màwla* applies to thoſe by manumiſſion, literally, and to thoſe by *Mawalát*, metaphorically; and where the literal ſenſe cannot be followed, the figurative ſenſe may be adopted.

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* *Màwla* is a term applying either to the *patron* or the *client*, (ſee Willa;) and expreſſes the relation between the *emancipated* and his *emancipator*. (See Vol. I. p. 425.)

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* See Vol. III. p. 437 and 448.

If, in the above caſe, the teſtator have only one freedman, and ſeveral freedmen of his freedman, the half of the legacy goes to the freedman, and the remaining half reverts to the teſtator's heirs; and there is nothing whatever for the freedmen of his freedman; for the term *Màwla* applies literally to the freedmen of the teſtator, and figuratively to the freedmen of thoſe freedmen; and it is impoſſible that the word ſhould be meant in two ſenſes, as it cannot bear, at once, a *literal* and a *figurative* meaning. Neither are the freedmen of the teſtator's parents or children included, they not being *his* freedmen either actually or virtually.

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* That is, "*the freedmen of his freedmen,*" or "*the emancipators of his emancipators.*"

# CHAP. V.

## Of Uſufructuary Wills.

If a perſon bequeath the ſervice of his ſlave, or the uſe of his houſe, either for a definite or an indefinite period, ſuch bequeſt is valid; becauſe as an endowment with uſufruct, either gratuitous or for an equivalent, is valid during life, it is conſequently ſo after death; and alſo, becauſe men have occaſion to make bequeſts of this nature as well as bequeſts of actual property. So likewiſe, if a perſon bequeath the wages of his ſlave, or the rent of his houſe, for a definite or indefinite term, it is valid, for the ſame reaſon. In both caſes, moreover, it is neceſſary to conſign over the houſe or the ſlave to the legatee, provided they do not exceed the third of the property, in order that he may enjoy the wages or ſervice of the ſlave, or the rent or uſe of the houſe during the term preſcribed, and afterwards reſtore it to the heirs.—If the whole property of the teſtator conſiſt of the ſlave or the houſe, in that caſe the ſlave is to be poſſeſſed one day by the legatee, and two by the heirs, alternately; but the houſe, on the contrary, is to be portioned into three equal parts, of which one is given to the legatee, and two to the heirs,—the legatee being entitled to one third of the eſtate, and the heirs to two thirds. The reaſon of the diſtinction here made between a houſe and a ſlave is, that a ſlave is incapable of being divided, and therefore an alternate uſe of him is eſtabliſhed from neceſſity; whereas a houſe, on the contrary, is capable of diviſion; and as diviſion is the moſt fair and equitable mode, (ſince retaliation neceſſarily induces a preference of one over the other in point of time,) it ought to be adopted where it is practicable. Still, however,

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muſt be conſigned to the legatee;—

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tions;

nor are the heirs (in the latter in- their ſhare.

The bequeſt becomes void on the death of the legatee.

ever, if the parties agree to enjoy the houſe by turns, it is lawful, as the right reſts entirely with them:—but diviſion is the moſt equitable mode.—It is not in this caſe lawful for the heirs to ſell the two thirds of the houſe which are allotted to them. This is according to the *Zâhir Rawâyet.* It is recorded from *Aboo Yooſaf* that ſuch ſale is lawful; becauſe theſe ſhares are purely their own property. The ground on which the *Zâhir Rawâyet* proceeds is, that a right of reſidence may eventually be eſtabliſhed to the legatee in the whole houſe, by ſo much other property of the teſtator being afterwards diſcovered as may cauſe the houſe to come within a third of his property. Beſides, the legatee has a controlling power over the heirs with reſpect to their portions, ſo far as to reſtrain them from executing any deed which may injure or affect his ſhare. If the legatee ſhould die before the expiration of the limited term of uſufruct, the article bequeathed in uſufruct immediately reverts to the heirs of the teſtator; for the bequeſt was made with a view that the legatee might derive a benefit from the teſtator's property; but if the article were to devolve to the legatee's heirs, it induces the conſequence of their being entitled to the uſe of the teſtator's property without his conſent, which is contrary to law. If the legatee die during the teſtator's lifetime, the bequeſt is void; becauſe the acceptance of it is ſuſpended upon the death of the teſtator, as has been already explained.

A bequeſt of the *produce* of an article does not entitle the to the uſe of the article;

If a perſon bequeath the *produce* * of his houſe or of his ſlave to *Zeyd*, in that caſe ſome are of opinion that it is lawful for *Zeyd* to reſide in the ſaid houſe himſelf, or to uſe the ſlave for his own ſervice, becauſe an equivalent for the uſe is in fact the ſame as the uſe itſelf, ſo far as relates to the accompliſhment of the teſtator's object. The more approved opinion, however, is, that it is not lawful; for a bequeſt of produce is a bequeſt of money, as it is that which conſtitutes produce; whereas reſidence or ſervice is an enjoyment of the uſe; and the effect of theſe is different with reſpect to the heirs; for if any juſt debt ſhould afterwards appear againſt the teſtator, it might be repaid by means of a reſtitution of the rent by the legatee, which could not be done in caſe of his having had the actual uſe.

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* By the term "*produce*" [Arab. *Hâſil*] as here uſed, is to be underſtood the *earnings* or *hire* of a ſlave, or the *rent* of a houſe, &c.

nor does a bequeſt of the *uſe* entitle him to let it to hire.

IT is not lawful for the uſufructuary legatee of a ſlave or a houſe to let them out to hire. *Shafeï* maintains that he is at full liberty ſo to do, becauſe, in conſequence of the bequeſt, he becomes (as it were) proprietor of the article; and, as ſuch, he is entitled to tranſfer it either for a return or otherwiſe, uſufruct (according to him) being equivalent to actual property. It is otherwiſe with a *loan*, that being (according to his tenets) ſimply a *licence* [to the uſe of a thing,] not an *inveſtiture* *. The arguments of our doctors upon this point are twofold.—FIRST, a bequeſt is an endowment with property, without a return, referred to the teſtator's deceaſe; and hence the legatee is not empowered to make a transfer of the legacy even *without* a return, becauſe of the analogy it bears to a *loan*; for a *loan*, according to our doctors, is an inveſtiture with the uſe of a thing granted in the lifetime of the lender; and the borrower is not permitted to *hire out* the article lent, (hire being an inveſtiture for a return) ſo here likewiſe.—A proof of this is that an inveſtiture for a return is ſtrong and binding, whereas inveſtiture without a return is weak and not binding; and a perſon who is not empowered with reſpect to the *weakeſt* of the two cannot be empowered with reſpect to the *ſtrongeſt*. Bequeſt, moreover, as being a gratuitous deed, is weak and not binding.—Now in gratuitous deeds the voluntary agent is at liberty to retract, not the other party:—but as, in the caſe of a bequeſt, the voluntary agent is the *teſtator*, and it is impoſſible for him to retract after his deceaſe, retractation is therefore not ſuppoſed poſſible in this inſtance;—yet ſtill as the bequeſt is not originally of a forcible and irrevocable

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* See Vol. III. p. 277.

able nature, the legatee of uſufruct is of courſe not at liberty to let the article to hire, ſince hire, as being a contract of exchange, is forcible and irrevocable. SECONDLY, uſufruct (according to our doctors) is not property; but the inveſtiture of it for property induces a creation of the character of worth in it, neceſſarily, in order to eſtabliſh an equality between the articles oppoſed to each other in exchange. Now the power of ſuch creation reſts only with one who is a proprietor of uſufruct as a dependant of his right of property, or in conſequence of a contract of exchange, and who is conſequently empowered to make over the property to another in the ſame manner in which he himſelf may have held it. But when a perſon who acquires the property of uſufruct without any return on his part, and in an original manner, (that is, not in virtue of its ſubjection to ſomething elſe,) afterwards makes it over to another for a return, it follows that he makes another proprietor of a thing in a degree ſuperior to what he himſelf in effect was, which is unlawful.

A bequeſt of the uſe of a ſlave does not entitle the legatee to carry him out of the place.

IF a perſon bequeath the ſervice of his ſlave to another, the legatee is not entitled to carry the ſlave from the city of the teſtator;—unleſs his own family reſide in another city, in which caſe he may carry him thither, provided he exceed not a third of the teſtator's property. The reaſon of this deciſion is, becauſe the bequeſt muſt take effect and be executed in conformity with the intent of the teſtator; and in a caſe where the family of the legatee reſide in the ſame city with the teſtator, his intent is that the legatee ſhall take the ſervice of the ſlave there, without expoſing him [the ſlave] to the trouble of a journey elſewhere;—whereas, on the other hand, where the family of the legatee reſide in a different city, the intent of the teſtator is that the legatee ſhall carry the ſlave thither in order that the family may enjoy the uſe of his ſervice, without putting them to the trouble of removing to his [the teſtator's] city to enjoy this advantage.

IF a perſon leave one year's product of his ſlave or houſe to another, and he have no other property except ſuch houſe or ſlave, the legatee in that caſe receives one third of a year's product; becauſe product, as being property, is capable of diviſion. If, therefore, the legatee require the heirs to make a diviſion of the houſe, in order that he may himſelf collect the product from his own ſhare, (being a third,) it would not be admitted. *Aboo Yooſaf*, indeed, according to one report, holds a contrary opinion; for he argues that the legatee is a partner with the heirs; and a partner has a right to demand a diviſion of the common property. In anſwer to this, however, it may be obſerved that this right amongſt copartners ariſes from their having a property in the article itſelf; whereas the legatee, in the preſent inſtance, has a property only in the *product* of the article, and conſequently is not entitled to demand a diviſion.

A bequeſt of a year's product, if the article exceed a third of the eſtate, does not entitle the legatee to a conſignment of it.

IF a man bequeath the *perſon* of his ſlave to *Zeyd*, and the *ſervice* of him to *Omar*, and the ſlave exceed not a third of the teſtator's eſtate, his perſon belongs to *Zeyd*, and his ſervice to *Omar*; for as the teſtator has bequeathed a ſpecific thing to each legatee reſpectively, each is therefore entitled to his own right. As, moreover, (the bequeſt to the uſufructuary legatee being at any rate valid,) if the ſlave's perſon had not been bequeathed, that would have belonged to the heirs, at the ſame time that his ſervices would have belonged to the legatee; ſo in the ſame manner his ſervices belong to the legatee of uſufruct where the teſtator has bequeathed his perſon to another; for bequeſt reſembles inheritance, inaſmuch as the right of property to the article is eſtabliſhed after death in both inſtances.

In a bequeſt of the uſe of an article to one, and the ſubſtance of it to another, the legatee of uſufruct is excluſively entitled to the uſe during his term.

IF a perſon bequeath his female ſlave to one and the child in her womb to another, or a ring to one and the ſtone of it to another, or a leathern bag, containing dates, to one, and the dates to another, and the legacy do not exceed a third of the eſtate,—in this caſe the firſt legatee gets his legacy, but the legatee of the *contained* article is not

A bequeſt of an article to one, and its contents to another, if *connectedly* expreſſed, entitles the ſecond legatee to nothing.

entitled to any thing. This is where the ſecond bequeſt is immediately connected in the ſame ſentence with the firſt. But if they be mentioned ſeparately, (as if the teſtator ſhould firſt ſay "I bequeath "my female ſlave to *Zeyd*," and then remain ſilent, and afterwards ſay "I bequeath the child with which ſhe is pregnant to *Amroo*,") the effect, according to *Aboo Yooſaf*, is the ſame as above mentioned; whereas *Mohammed* maintains that in this caſe the female ſlave goes to the firſt legatee, and her child is ſhared equally between the two; (and the ſame holds with reſpect to the two other caſes of the *ring* and the *bag*.) The argument of *Aboo Yooſaf* is that as the teſtator firſt bequeathed the female ſlave, and afterwards the child in her womb, it may be inferred that his object in the firſt bequeſt was the female ſlave only, the ſecond bequeſt being merely an explanation of his meaning in the firſt,—which explanation is approved, whether it be connected in the ſame ſentence or not; for as the bequeſt is not binding till after the death of the teſtator, his explanation connectedly or *un*connectedly is one and the ſame*; in the ſame manner as holds where a perſon firſt bequeaths the perſon of his ſlave to one and afterwards the ſervice of him to another,—in which caſe the legatee of the perſon is not a partner of the legatee of uſufruct with reſpect to the ſervice of the ſlave. The argument of *Mohammed* is that the word *ring* comprehends both the ſtone and the hoop, and ſo likewiſe, the word *female ſlave* comprehends both the ſlave herſelf and alſo the child in her womb,—and the word *bag* includes both the bag and its contents. With reſpect, therefore, to the ring-ſtone, the child, and the contents of the bag, there are two different bequeſts to two different perſons, where both the legatees are equal partners in each. Nor is the ſecond bequeſt, in this inſtance, a retractation of the firſt, it being, in effect, the ſame as where a perſon firſt bequeaths a ring (for inſtance) to one, and again bequeaths the ſame ring to another,—in which caſe the ſecond bequeſt is not a retractation of the firſt, but the two legatees are equal partners in the ring; and ſo here likewiſe. It is different where a man firſt bequeaths the perſon of his ſlave to one, and then the property of him to another, as the word *ſlave* does not comprehend the *ſervice* of that ſlave. It is alſo different where a ſecond bequeſt follows in immediate connexion with the firſt; for in that caſe the whole forms (as it were) one ſentence, indicating the deſign of the teſtator to be that the *hoop* of the ring (for inſtance) ſhall go to one, and the ſtone to the other.

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* In other words, "he is at liberty, at any period after making the bequeſt, to alter "or amend it."

IF a perſon bequeath to any one "the fruit of his garden," in that caſe the legatee gets the fruit actually in being at the time of the teſtator's death, not what may be produced afterwards. If, however, the teſtator ſay "I bequeath the fruit of my garden *perpetually* "to ſuch an one," the legatee is in that caſe entitled to the fruit then exiſting, as well as to whatever may afterwards grow there during his life. But if, on the other hand, the teſtator bequeath the *produce* of his garden, (not the *fruit*,) the legatee is then entitled to the preſent produce and to whatever may be collected from it until his death, although the word *perpetual* ſhould not have been expreſſed; for as the word *fruit*, in its common acceptation, means a thing actually in being, it cannot therefore be applied to what is *not* in being, unleſs by an expreſs proviſion for that purpoſe;—whereas *produce*, in the common acceptation of the term, comprehends not only what at preſent exiſts, but alſo what may hereafter exiſt in ſucceſſion; and therefore its including what may appear after the teſtator's deceaſe does not depend upon the mention of any particular proviſion or term.

A bequeſt of the fruit of a garden implies the *preſent* fruit only, unleſs it be

IF a perſon bequeath the *wool* of a ſheep, or its *milk*, or *young*, and then die, the legatee is in that caſe entitled to whatever may be extant (of theſe things) at the period of the teſtator's death, and not to what may afterwards appear, notwithſtanding the word "*perpetual*" have

A bequeſt of the produce of an *animal* implies the *exiſtent* produce only, in every in- have been expreſſed; as the term *wool*, or ſo forth, (as mentioned above,) do not comprehend what is not actually in being. It is otherwiſe with reſpect to *fruit*, (although that term alſo, in its common acceptation, comprehends only what is actually exiſtent, and a bequeſt of non-exiſtent fruit be nevertheleſs valid,) becauſe ordained contracts[*] (ſuch as of gardening and hire) with reſpect to non-exiſtent fruit being good in LAW, it follows that the word *fruit*, mentioned with a condition of *perpetuity*, comprehends alſo what is non-exiſtent, and that a bequeſt of ſuch is valid. It is otherwiſe with the wool, the milk, or the young of a ſheep; for as, with reſpect to the non-exiſtent of thoſe articles, there are no ordained contracts, a bequeſt of ſuch is not valid:—contrary to what is exiſtent; for theſe are ſubjects of a valid contract (ſuch as *Khoola* and the like,) and therefore a bequeſt of them is likewiſe valid.

## CHAP. VI.

## Of Wills made by *Zimmees*.

or during *health*, deſcends to the founder's heirs.

IF a *Jew* or a *Chriſtian*, being in ſound health, build a church or a ſynagogue, and then die, ſuch building is an inheritance, according to all our doctors; becauſe *Haneefa* holds an erection of this nature to be equivalent to a *Wakf*, or pious appropriation, which (agreeably to his tenets) is not abſolute*, but deſcends to the heirs of the founder; and the two diſciples, on the other hand, hold all ſuch erections to be ſinful in their nature, whence they are of no validity [as a public foundation,] and therefore deſcend to the heirs [in the ſame manner as any other of the founder's property.]

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[*] *Ordained* contracts are ſuch as are authorized and ſanctioned by the KORAN, and concerning the validity of which, therefore, no doubt can be entertained.

IF a *Jew* or *Chriſtian* will that, "after his death, his houſe ſhall "be converted into a church or ſynagogue for a particular ſet of peo-"ple," the bequeſt is valid, according to all our doctors, and takes effect to the extent of a third of the teſtator's property; becauſe a bequeſt has two different characters, the appointment of a ſucceſſor, and an actual endowment; and the teſtator is competent to either of theſe.

In the bequeſt of a
[illegible]
of worſhip, it is appropriated accordingly,

IF a *Jew* or *Chriſtian* will that "his houſe be converted into a "church or ſynagogue for a ſect of people," without ſpecifying the particular ſect, the bequeſt is valid, according to *Haneefa.* According to the two diſciples, on the contrary, it is not valid; for a deed of that nature is in reality ſinful, although it may appear pious to the teſtator; and a will for a ſinful purpoſe is null, becauſe the execution of it would be a confirmation of ſin. The argument of *Haneefa* is, that the founding of churches or ſynagogues is held, by theſe perſons, to be an act of piety; and as we are enjoined to leave them to the exerciſe of whatever may be agreeable to their faith, the bequeſt is therefore lawful, in conformity with their belief.

whether any particular legatees be
otherwiſe.

OBJECTION.—What is the difference between the building a church or ſynagogue in the time of health, and the bequeathing it by will, that *Haneefa* ſhould hold it inheritable in the former inſtance, and not in the latter?

REPLY.—The difference is this: that it is not the mere *erecting* [of the church, &c.] which extinguiſhes the builder's property, but the excluſive dedication of the building to the ſervice of God, as in the caſe of *moſques* erected by *Muſſulmans*; and as an infidel place of worſhip is not dedicated to God, indiſputably, it therefore ſtill remains the property of the founder, and is conſequently inheritable [in common with his other effects;]—whereas a *bequeſt*, on the contrary, is uſed for the very purpoſe of deſtroying a right of property.

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* See Vol. II. p. 334.

The bequeſts of *Zimmees* are of four kinds[*].—I. Thoſe made for purpoſes held pious in their belief, but not in the belief of *Muſſulmans*, ſuch as the building a church or a ſynagogue, (as already mentioned,) or the ſlaughter of hogs to feed the poor of their ſect; in which caſes *Haneefa* holds the bequeſt to be valid, in conformity with the faith of the teſtator, whereas the two diſciples deem it invalid, as being ſinful.—II. Thoſe made for purpoſes held pious with *Muſſulmans*, but not with *Zimmees*, ſuch as the erection of a *moſque*, a pilgrimage to *Mecca*, or burning a lamp in a *moſque*, in all of which inſtances the bequeſt is invalid in conformity with the belief of the teſtator, according to all our doctors; unleſs, however, it be made in favour of ſome particular perſons, in which caſe it is valid, as under ſuch circumſtance it is an inveſtiture, the mention of "building a *ue*," or ſo forth, being conſidered merely in the light of a *counſel*, (in other words, as if the teſtator had bequeathed his property to particular perſons, *counſelling* them therewith to erect a *moſque*.) III. Thoſe made for a purpoſe held pious both by *Muſſulmans* and *Zimmees*, ſuch as burning a lamp in the holy temple [of *Jeruſalem*,] or waging war againſt infidel *Tartars*[†],—which are valid, whether made in favour of ſpecific perſons or not.—IV. Thoſe made for purpoſes not held pious either by *Zimmees* or *Muſſulmans*, ſuch as the ſupport of ſingers and diſſolute women,—which are invalid, as being of a ſinful tendency;—unleſs, however, they be made in favour particular perſons, and then they are valid.

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[*] The diſtinctions here ſtated apply ſolely to bequeſts for *particular purpoſes*.

[†] *Koofr al Toork*: the name by which the bands of robbers who uſed to infeſt the northern provinces of *Perſia* were formerly diſtinguiſhed.

A SENSUALIST[*], or an innovator[†], provided he proceed not to open and avowed infidelity, is, in point of bequeſt, in the ſame ſtate with a perfect believer, becauſe the law regards only his *apparent* ſtate, which is that of a *Muſſulman:* but if he proceed to open infidelity, he is then conſidered as an apoſtate, and with regard to his will there is a difference of opinion, (in the ſame manner as our doctors have differed with regard to every other deed of ſuch perſons,)—*Haneefa* holding that in this caſe his bequeſt remains in ſuſpenſe, and becomes valid upon his repentance, or null upon his death or expatriation,—and the two diſciples (on the contrary) maintaining that it is in every reſpect valid[‡].

The will of a

*Muſſulman,*
unleſs he proceed to avowed apoſtacy.

THE will of an apoſtate woman is valid. This is approved; becauſe women in ſuch caſes are left to themſelves, and not put to death, as in the caſe of men[§].

The will of a female apoſtate is valid.

IF a *Mooſtâmin* bequeath the *whole* of his property to a *Muſſulman* or a *Zimmee,* it is valid; for a bequeſt of the *whole* of an eſtate is deemed illegal only as it affects the right of the teſtator's heirs; (whence it is that if they aſſent ſuch bequeſt is valid;) but the heirs of the *Mooſtâmin* are poſſeſſed of no cognizable rights, they being, as it were, dead, ſo far as relates to the *Muſſulman* government, becauſe of their being in a hoſtile country. Beſides, the property of a *Mooſtá-*

A

property:

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[*] Arab. *Sàbib-al-bàwa. Hàwa* ſignifies the ſenſual paſſions, a complete conqueſt over which is eſſential to the character of a good *Muſſulman.*

[†] Arab. *Sàhib-al-biddàt.* A free-thinker or ſectary.—A broacher of new and heterodox opinions in matters of faith.

[‡] For a full explanation of this ſee Vol. II. p. 236.

[§] See Vol. II. p. 227.

*min* is in ſecurity only in virtue of the protection he receives from the ſtate, which protection he enjoys in his own right, not in right of his heirs.

but if he bequeath a *part* only, the reſidue is tranſmitted to his heirs.

If a *Mooſtâmin* bequeath a part of his property, the bequeſt is executed accordingly, and the remainder is tranſmitted to his heirs, notwithſtanding they be reſidents in an hoſtile country; ſuch being the law with reſpect to *Mooſtâmins*. *

An emanci- granted him on deathbed, takes effect

If a *Mooſtâmin*, immediately before his death, emancipate his ſlave, or make him a *Modabbir* in the *Muſſulman* territory, it is valid, and the ſlave is accordingly free, notwithſtanding his value exceed a third of his maſter's eſtate; for a bequeſt beyond a third of the property is deemed illegal only as it affects the right of the teſtator's heirs; but a *Mooſtâmin*'s heirs poſſeſs no cognizable right, as was already mentioned.

Any bequeſt

If a *Muſſulman* or *Zimmee* make a will in favour of a *Mooſtâmin*, it is ; for a *Mooſtâmin*, ſo long as he reſides in a *Muſſulman* coun- is conſidered in the light of a *Zimmee*; and as the exerciſe of generoſity and benevolence in favour of ſuch is therefore allowed to *Muſſulmans* during life, it is alſo permitted them to extend ſuch acts to a period after their death.—(It is related of *Haneefa* and *Aboo Yooſaf*, that they held wills in favour of *Mooſtâmins* to be illegal, becauſe of their intention to return to their own country; and alſo, becauſe the *Muſſulmans* not only allow this, but even do not ſuffer them to reſide in their dominions more than a year, unleſs they ſubmit to the payment of the capitation-tax.—The former is, however, the better opinion.)

The bequeſts

If a *Zimmee* bequeath more than a third of his eſtate to a ſtranger, or to an heir, it is not valid, as being contrary to the laws of the

*Muſſulmans*, to which they have agreed to conform with reſpect to all temporal concerns.

the ſame reſtrictions with thoſe of a

If a *Zimmee* make a will in favour of an infidel of a different perſuaſion, it is valid, becauſe of the analogy of legacies to ſucceſſion by inheritance, all the different deſcriptions of thoſe perſons who diſbelieve the true faith being conſidered as of one claſs.

He may make a bequeſt in favour of an unbelic of a di

If a *Zimmee*, reſiding in the *Muſſulman* territory, make a will in favour of a hoſtile infidel, it is not valid; for as inheritance does not obtain between thoſe, becauſe of the difference of country, it follows that a bequeſt from the one to the other is of no effect, bequeſt being ſimilar to inheritance.

not being *hoſtile infi*

## CHAP. VII.

## Of Executors and their Powers.

If a perſon appoint another his executor, it remains with that other either to accept of or decline the appointment, in the preſence of the teſtator; becauſe no one has the power of compelling another to interfere in his concerns. But if the executor accept his appointment in the preſence of the teſtator, and afterwards, either in his abſence, or after his death, decline it, ſuch refuſal is not admitted; becauſe the teſtator had placed a reliance on his conſent; and therefore, if the

An executor, having accepted his appointment in preſence of rejection were allowed of, either in his abſence or after his deceaſe, he would neceſſarily be deceived.

leaves him an option of re-

but any a

binds him to the execution of the office.

If a perſon appoint another his executor, and that other remain ſilent, without giving any indication of his acceptance or refuſal, he is in that caſe at liberty, after the death of the teſtator, to accept or refuſe the appointment, as may be moſt agreeable to him. But if a perſon, under ſuch circumſtances, ſhould, immediately after the death of the teſtator, diſpoſe of any part of the effects by ſale, then, as an act of this kind is a clear indication of his acceptance, the executorſhip becomes obligatory on him. The ſale, moreover, is valid in this inſtance, notwithſtanding the executor may not have conſidered himſelf as ſuch at that time; for his executorſhip (like inheritance, bequeſt being a ſort of ſucceſſion as well as inheritance,) does not depend on his knowledge; and, as being an executor, a ſale tranſacted by him is valid.

Having re

pointment, after the teſtator's deceaſe, he may

appoint an in interim.

If a perſon appoint another his executor, and the perſon ſo appointed remain ſilent until the teſtator's deceaſe, and then reject the office, and afterwards declare his acceptance of it, ſuch acceptance is valid, unleſs the *Kázee*, during the interim, ſhould have ſet him aſide, and appointed another, in conſequence of his firſt declaration; becauſe the refuſal does not immediately annul the appointment, that being injurious to the deceaſed; and although the continuance of it be prejudicial and troubleſome to the executor, ſtill he has the *merit* of it, which is an equivalent for the diſadvantage,—whereas the injury to the deceaſed has nothing to counterbalance it. The executorſhip therefore endures in this caſe. If, however, the *Kázee* ſet him aſide, his decree to that effect is valid, as he poſſeſſes the power of removing an inconvenience, to which executors are frequently ſubjected, and which may render the continuance of the office injurious to them. The *Kázee*, therefore, to remedy this, may diſcharge the executor from his office, and appoint another in his room, to act with the eſtate, thereby preventing an injury both to the executor and the deceaſed. If, moreover, the executor, after being thus diſmiſſed by the *Kázee*, declare his willingneſs to undertake the executorſhip, ſuch declaration is not admitted or attended to, as he here aſſents after his appointment having been altogether annulled by the order of the *Kázee*.

A person may appoint a ſlave, a reprobate*, or an infidel, to be his executor; but it is incumbent on the *Kázee* to annul ſuch appointment, and nominate another perſon, becauſe of the diſadvantages which would attend the confirmation of it in either of thoſe inſtances; for a ſlave could not act but by the power of his maſter; a reprobate may be ſuſpected of fraud; and it is not fit ſuch a truſt ſhould be committed to an infidel, as the enmity which every infidel may be ſuppoſed to entertain towards a *Muſſulman* on the ſcore of religion will occaſion a diſregard to his intereſt. The diſſolution of ſuch appointments is therefore incumbent on the *Kázee*, notwithſtanding their original validity.

W[illegible] a *ſla*[illegible], a *reprobate*, or i[illegible] the magiſtrate muſt nominate a proper ſub-

If a perſon appoint his own ſlave his executor, any of the heirs being arrived at the age of maturity, it is not valid; becauſe ſuch heirs may prevent the ſlave from the execution of his office by ſelling their property in him to another, and thereby rendering him incapable of acting but by the conſent of the purchaſer. If, on the contrary, the heirs be all infants, the appointment is in that caſe valid, according to *Haneefa*. The two diſciples maintain that it is not valid; (and ſuch is what analogy would ſuggeſt;) becauſe ſlavery is incompatible with the exerciſe of power; and alſo becauſe, in this particular inſtance, it would follow that the property was maſter over the proprietor, which is contrary to law. The argument of *Haneefa*

ment of the teſtator's ſlave is invalid, if any of the heirs have attained to maturity; but not otherwiſe.

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* Arab. *Fáſik*. (The term has been repeatedly defined.)

is, that the ſlave is ſane and adult, and therefore capable of the diſcharge of ſuch truſt. Neither has any perſon the power of prohibiting him from it, becauſe the heirs, although they be his maſters, yet cannot exert this power, on account of their youth. As, moreover, the deceaſed appointed him to this truſt, it may hence be inferred that his tenderneſs, and regard for the heirs was ſuperior, in his opinion, to that of any other. This appointment, therefore, is valid; in the ſame manner as that of a *Mokâtib*;—in other words, if a perſon appoint his *Mokâtib* his executor it is valid; and ſo here likewiſe.

In caſe of the ... muſt give him an aſſiſtant:

If an executor be unequal to the execution of his office, it is incumbent on the *Kâzee* to aſſociate another with him, in order that the duties of the office may be properly executed.

but he muſt not do ſo on the executor pleading incapacity, without due examination;

If an executor repreſent to the *Kâzee* his inability to execute the duties of his charge, it is requiſite, in ſuch caſe, that the *Kâzee*, before he attends to his repreſentation, make particular enquiry into the truth of it, as complainants of this kind often aſſert falſehoods, with a view to alleviate their own burden. But if it ſhall appear to the *Kâzee*, on due examination, that the executor is utterly incapable of the office, he muſt releaſe him, and appoint another in his place, this being advantageous both to the executor and to the eſtate.

and if he appear perfectly equal to the office, he cannot be removed.

If an executor be perfectly equal to the diſcharge of his office, and truſtworthy therein, the *Kâzee* is not at liberty to diſmiſs him; for any perſon whom the *Kâzee* may appoint in his place muſt be leſs eligible, as the deceaſed had particularly ſelected him, and ſignified his confidence in him. He therefore muſt be continued in preference to all others; even to the teſtator's father, notwithſtanding his ſuppoſed tenderneſs; and conſequently to others *a fortiori*.

He cannot be removed on the complaint

If all or part of the heirs prefer a complaint againſt the executor, ſtill the *Kázee* muſt not diſmiſs him immediately, nor until his guilt be aſcertained, as he acts under an authority derived from the deceaſed. If, however, he prove culpable, it is incumbent on the *Kázee* to diſmiſs him and appoint another in his place; for the deceaſed nominated him to the office from ſuppoſing him worthy of confidence; but upon being found culpable he no longer continues ſo, inſomuch that if the teſtator were living he would himſelf diſcharge him;—and as *he* is incapacitated, by death, from ſo doing, the *Kázee* muſt take this upon him as his ſubſtitute.

One of two joint executors cannot act without the concurrence of the other;

If a man appoint two executors, neither of them is entitled, according to *Haneefa* and *Mohammed*, to act without the other, except in particular caſes, of which an explanation ſhall be hereafter given.—*Aboo Yooſaf* is of opinion that in all caſes either of them may act without the other, becauſe, an executor is endowed with his power of action in virtue of the will of the teſtator; and as power of action is a thing ſanctioned by the LAW, and incapable of diviſion *, he enjoys his power complete and perfect in the ſame manner as a complete authority to contract their infant ſiſter in marriage appertains to each of her brothers reſpectively.—(The ground of this is, that executorſhip is a ſucceſſion, which ſucceſſion cannot be eſtabliſhed in the executor, unleſs the authority of the teſtator devolve to him in the ſame degree in which it had appertained to the teſtator, that is, completely and perfectly.)—The teſtator's choice, moreover, of the *two* to be his executors is an argument of the particular attachment of each to his intereſt, which attachment is equivalent to the conſanguinity of two brothers in the point of contracting their infant ſiſter in marriage.—The arguments of *Haneefa* in ſupport of his opinion are twofold.—First, the power of an executor, being derived from the teſtator, is of conſequence to be exerciſed in the manner preſcribed by him; and in the caſe in queſtion the teſtator has entruſted this power to both the executors, on the condition of their being *united* in the truſt, for he does not expreſsly aſſent to their acting otherwiſe than jointly, and the above condition is moreover attended with advantage, as the deliberations of *two* perſons are better than of *one*. It is otherwiſe with two brothers, in the circumſtance of contracting their infant ſiſter in marriage, (as adduced by *Aboo Yooſaf*,) ſince the cauſe of ſuch authority being veſted in them is *relationſhip*, a cauſe which exiſts equally in each. The contracting in marriage, moreover, is a right of the infant, reſting upon her guardian, (inſomuch that if the infant require her guardian to contract her to any perſon, being her equal, for whom ſhe has a liking, he muſt comply,) whereas, in the caſe here conſidered, the acting [with the eſtate] is the right of the executor himſelf, not of another *reſting upon him*. In the caſe of contracting the infant in marriage, therefore, if one of the two brothers ſo contract her, he merely diſcharges a *duty* incumbent on the other brother, and his act is therefore valid; whereas, in the caſe of executorſhip, if one of the two act alone, he exerciſes a right appertaining to the other, and his ſo doing is therefore invalid;—in the ſame manner as where two perſons owe a ſum of money to one, in which caſe it would be perfectly lawful for either of them to diſcharge the whole debt, whereas, ſuppoſing *one* man to owe a ſum of money to *two* others, it would not be lawful for him to pay the whole to either of them. The caſes excepted by *Haneefa* and *Mohammed*, in which they hold the acts of either executor, ſingly, to be valid, are ſuch as require *immediate* execution. Thus it is lawful for either executor, ſingly, to diſburſe the funeral charges, as a delay in this might occaſion the body to become offenſive; whence it is that a ſimilar power is veſted in the neighbours. In the ſame manner, either of the executors, ſingly, may purchaſe victuals or clothes for the infant children of the teſtator, this being a matter of urgency, and which admits of no delay. So, likewiſe, it is lawful for either of the executors to reſtore a depoſit, an uſurped article, or a thing purchaſed by the teſtator under

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* That is, cannot be enjoyed or exerciſed *partially*.

except in ſuch
s as re-
immediate execution,

or which are

under an invalid contract. In preſerving the eſtate of the teſtator, alſo, and in diſcharging his debts, the act of either executor is lawful independant of the other. For none of theſe are conſidered as an *exerciſe of power*, but merely the performance of a duty,—inſomuch that the depoſitor has himſelf a right to ſeize and carry away his depoſit, if he find it among the effects of the deceaſed, and the creditor has a ſimilar right with regard to his debt;—and it is, moreover, the duty of every one into whoſe hands property may fall, to attend to the preſervation of it, whence this comes under the deſcription of *aid* and *aſſiſtance*, not of an *exerciſe of power*;—neither do any of theſe acts require thought or conſideration. Either of the executors has alſo a right ſingly to diſcharge a legacy, or emancipate a ſlave, if directed by the teſtator, becauſe ſuch deeds require no thought. or conſideration. In the ſame manner, either of them may inſtitute a ſuit in claim of the rights of the teſtator, becauſe a conjunction of both in ſo doing would be impracticable, ſince, if they were to do it at one and the ſame time in the aſſembly of the *Kâzee*, they muſt occaſion noiſe and confuſion;—(whence it is that only one of two agents for litigation is allowed to plead at a time.) The acceptance of a gift for an infant is likewiſe an act which either may perform ſingly; for in caſe of delay there is a poſſibility of the gift being rendered null by the death of the donor previous to the ſeizure. Theſe acts, moreover, being permitted to a mother and nurſe, is a proof that they are not *exertions of power*. It is likewiſe permitted to any of the executors, ſingly, to ſell goods where there is an apprehenſion of their ſpoiling, as in the caſe of fruit, and the like; and alſo to collect together and preſerve the ſcattered property of the teſtator, as a delay might occaſion the deſtruction of it; and ſuch permiſſion is, moreover, given to every perſon into whoſe hands property may fall, whence it may be inferred that this is not an exertion of power. (It is recorded, in the *Jama Sagheer*, that none of the executors, where there are more than one, has ſingly the power of ſelling goods, or receiving payment of

or in which
the intereſt or

debts, becauſe theſe are exerciſes of power which they muſt perform jointly, in conformity with the will and intention of the teſtator.)

aſe of a ſtator appointing different times.

If a perſon appoint two executors in a ſeparate manner, (as if he ſhould firſt ſay to the one " I have appointed you my executor," and again, at a different period, to the other " I have appointed you my executor,") ſome allege that in this caſe each of them has individually a power of exerciſing the functions of his appointment, without conſulting the other, in the ſame manner as two agents, where they are appointed by different commiſſions;—the reaſon of which is that the teſtator, in appointing the two ſeparately, indicates his aſſent to each acting from his own judgment, without the others aſſiſtance or advice. Others, again, ſay that concerning this caſe alſo a diſagreement ſubſiſts between *Haneefa* and *Mohammed* on one ſide, and *Aboo Yooſaf* on the other; becauſe a will is not eſtabliſhed until the death of the teſtator; and at that time both are executors together, notwithſtanding they had been appointed ſeparately. It is otherwiſe with two agents appointed under different commiſſions; for the appointment of each of thoſe ſtill continues diſtinct and ſeparate, as ſettled by the conſtituent.

of a joint executor, the magiſtrate muſt appoint a ſub-

one of two executors die, it is incumbent on the *Kázee* to appoint another in his room. This is the opinion of *Haneefa* and *Mohammed*; becauſe, according to their doctrine, the remaining executor has not, of himſelf, power to act on every occaſion, and the intereſt of the deceaſed therefore requires the appointment of another to operate with him; and it is alſo the opinion of *Aboo Yooſaf*, becauſe, although the remaining executor be (according to him) empowered to act of himſelf, ſtill it behoves the *Kázee* to appoint another his companion; for the deſign of the teſtator evidently was, to leave *two* ſucceſſors the management of his concerns; and as this may be fulfilled by the appointment of a ſubſtitute for him who dies, one muſt be appointed accordingly.

unleſs the deceaſed have himſelf no-

If the deceaſed executor have appointed the living executor to act for him, it is in that caſe lawful for the latter (according to the *Zâhir Rawâyet*) to act alone, nor is it incumbent on the *Kâzee* to appoint another in the room of the deceaſed; becauſe here the judgment of the deceaſed executor virtually ſubſiſts in the living one, as it were, by ſucceſſion.—(There is a tradition of *Haneefa* having contradicted this doctrine, becauſe of its repugnance to the object of the teſtator; namely, the agency of two perſons: in oppoſition to the caſe where a dying executor appoints ſome other perſon to ſucceed him; for ſuch appointment is valid, becauſe of its being attended with the advantage of the judgment of two diſtinct perſons, as was intended by the teſtator.)

fice.

If an executor, previous to his death, appoint another perſon *his* executor, in that caſe the perſon ſo appointed is entitled to act as executor, both to him, and alſo to the perſon to whoſe affairs his immediate teſtator had acted as executor. This is according to our doctors. *Shafeï* maintains that the perſon ſo appointed is not entitled to act as executor to the firſt deceaſed, becauſe of the analogy his appointment bears to that of an agent; in other words, if a perſon, during his lifetime, appoint an agent to act for him, that agent is not permitted to delegate his powers to another without having previouſly obtained the conſent of his conſtituent.—(The ground of analogy between theſe two caſes is, that in the ſame manner as the conſtituent is ſuppoſed to place a reliance on the agent, and on him only, ſo alſo the teſtator may be ſuppoſed to act with regard to the executor.) The arguments of our doctors upon this point are twofold.—FIRST, an executor derives his power from the teſtator; and it is therefore lawful for him to appoint an executor to ſucceed him;—in the ſame manner as in the caſe of a grandfather; in other words, a father has the power of beſtowing his child in marriage, which devolves upon *his* father after his death; and the grandfather has in ſuch caſe the power of appointing an agent for the execution of the child's marriage; and ſo likewiſe, it is lawful for an executor to appoint another executor, as the power appertaining to the teſtator devolves upon executor, in the ſame manner as a father's right to diſpoſe of his in marriage devolves upon the grandfather. As, moreover, grandfather is the father's ſubſtitute with regard to the power which devolves to him, ſo in the ſame manner the executor is the ſubſtitute of the teſtator; becauſe the nomination of an executor is, in effect, an appointment, by the teſtator, of a ſubſtitute with reſpect to the matters in which he is himſelf empowered; and as the executor, at the time of *his* death, poſſeſſed a power with reſpect to both eſtates, (his own, and alſo that of his teſtator,) it follows that the ſecond executor (that is, the one appointed by him) is his ſubſtitute with reſpect to both eſtates alſo.—SECONDLY, as the teſtator had recourſe to the exiſtence of the executor, notwithſtanding he knew there was a poſſibility of his dying in the interim, and thereby leaving his object unaccompliſhed, it may be inferred that his intention was that his executor ſhould in ſuch caſe appoint another. It is otherwiſe with an agent; for he is not at liberty to appoint any other perſon *his* agent without the conſent of his conſtituent; becauſe, as the latter is ſtill living, and conſequently has it in his power to accompliſh his object himſelf, it is therefore not to be ſuppoſed that he will conſent to his appointing another agent under him.

An executor is entitled to poſſeſs himſelf of the portions of infant and *adult* n their

IF an executor, the legatees being preſent, divide off the eſtate of the teſtator from the legacies, on behalf of his heirs who are infants, or adult abſentees, and take poſſeſſion of their portions, it is lawful; for an heir is ſucceſſor to the deceaſed; and as an executor is alſo a ſucceſſor to him, he is of courſe a competent litigant on behalf of infant or abſent heirs, and may, of conſequence, make a diviſion, and poſſeſs himſelf of their portions on their behalf,—inſomuch that if thoſe portions were to periſh in his hands, ſtill they are not at liberty to participate with the legatees in what remained to them after ſuch diviſion.

If, on the contrary, an executor, the heirs being adult and preſent, divide off the legacies from the eſtate, and take poſſeſſion of them on behalf of infant or abſent legatees, it is unlawful; for a legatee is not a ſucceſſor to the deceaſed in *every* reſpect, he being conſtituted a proprietor by a new and ſupervenient cauſe; and as, therefore, the executor does not ſtand as litigant on his behalf, his taking his [the legatee's] portion is not valid,—inſomuch that if the legacy were to periſh in his [the executor's] hands, the legatee would be entitled to take a third of whatever had remained to the heirs. Neither is any compenſation due from the executor in this inſtance; becauſe an executor is a truſtee; and as the power of conſerving the effects of the teſtator is lodged in him, the caſe is therefore the ſame as if the loſs had happened previous to the diviſion of the effects.

but not of the legacies of infant or abſent legatees.

If a perſon bequeath a ſum for the performance of a pilgrimage to [illegible]*ca*, and then die, and the executor divide off the ſaid ſum from the heirs, and take poſſeſſion of it, and it be afterwards loſt or deſtroyed, either in his charge, or in that of the perſon whom he had appointed for the performance of the pilgrimage, in that caſe, according to *Haneefa*, a third of the remaining property of the deceaſed muſt be appropriated for the pilgrimage. *Aboo Yooſaf*, on the other hand, holds that if the ſum thus loſt have been originally equivalent to a third of the property, nothing is afterwards to be taken from the heirs; but that if it was leſs, the deficiency muſt be applied to the purpoſe of the pilgrimage. *Mohammed*, on the contrary, is of opinion that in neither caſe is the executor to take any thing from the heirs; becauſe the ſetting aſide of a particular ſum, for the performance of the pilgrimage, was the undoubted right of the teſtator; and as, if he had himſelf ſet aſide the ſum for that purpoſe, and it had afterwards been loſt or deſtroyed, nothing further would have been required, and the legacy would have been void, it is in the ſame manner void where the ſum was ſet aſide by the executor, as he acts for, ſtands in the place of, the deceaſed. The argument of *Aboo Yooſaf*, in

A legacy appropriated to pilgrimage, if i [illegible] be to the extent of a third of the eſtate.

in ſupport of his opinion, is that a third of the whole property is a fund for the execution of wills, to which extent only they are to be executed, and no farther. The arguments of *Haneefa*, in ſupport of his opinion on this point, are twofold. FIRST, the performance of the pilgrimage was the object of the teſtator, not the ſetting aſide a ſum for that purpoſe; and therefore the appropriation or delivery of the money, without the accompliſhment of the object, is of no conſideration, it being, in effect, the ſame as if the ſum had been loſt previous to the diviſion,—in which caſe a third of the remainder would be appropriated to the pilgrimage. SECONDLY, the diviſion, with reſpect to the legacy, is not perfect and complete until the portion bequeathed for the purpoſe of pilgrimage be expended thereupon, as there is no perſon to take poſſeſſion of it *. Where, therefore, this ſum is not expended in the performance of pilgrimage, the partition is incomplete, and the caſe is (conſequently) the ſame as if the ſum had been loſt or deſtroyed before the partition.

A legacy, after being divided off by the magiſtrate, deſcends to the legatees heirs in caſe of his deceaſe.

IF a perſon bequeath a third of one thouſand *dirms* to another who is at that time abſent, and the heirs conſign the ſaid ſum to the *Kázee*, in order to divide and ſet apart the ſhare of the abſent legatee, the diviſion thus made by the *Kázee* is valid, becauſe of the original validity of the will, inſomuch that if the abſentee ſhould afterwards die, previous to his having declared his acceptance, the legacy nevertheleſs devolves to his heirs. The office of *Kázee*, moreover, is inſtituted with a view to the benefit of mankind, that he may attend to the conſervation of their rights, eſpecially with reſpect to ſuch as are dead or abſent;—and as among theſe attentions to the rights of mankind is the ſetting aſide and taking poſſeſſion of the portions of abſentees, ſuch acts by him on behalf of an abſentee are valid of courſe,—inſomuch that if ſuch portion were deſtroyed in his poſſeſſion, and the legatee ſhould afterwards appear, ſtill he would have no claim upon the heirs.

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* In other words, there is no *individual* legatee.

IT is lawful for an executor, in order to diſcharge the debts of the deceaſed, to ſell a ſlave for a ſuitable price, in the abſence of the creditors; for as the teſtator might have done ſo during his lifetime, the executor, as his repreſentative, is entitled to do the ſame. The ground on which this proceeds is, that the right of the creditors to the effects of the deceaſed lies, not in the things themſelves, but in their worth; and the worth of the ſlave is not annihilated by the ſale, as the price (which is in reality the worth) ſtill remains. It is otherwiſe with reſpect to an indebted ſlave; for the ſale of ſuch in the abſence of the creditors is not valid, as their right lies in the *perſon* of the ſlave, they having a claim to the earnings of his labour, which would be annihilated by the ſale of him.

An executor may ſell a ſlave of the eſtate, for the diſcharge of the debts upon it, in abſence of the creditors,

unleſs the

debt.

IF a perſon appoint another his executor, directing him, after his deceaſe, to ſell a ſlave, and beſtow the price in charity, and the executor accordingly ſell the ſlave and take poſſeſſion of the price, and it be afterwards loſt or deſtroyed with him, and the ſlave prove to be the property of another perſon, he [the executor] is accountable to the purchaſer for the price, agreeably to the laws of ſale; and he is entitled to take an equivalent from the effects of the deceaſed, being, as it were, an agent on his behalf. This indemnification, according to *Haneefa*, he is to take from the whole of the eſtate at large, and ſuch is the *Záhir Rawáyet*. It is recorded from *Mohammed*, on the contrary, that he is to indemnify himſelf from the third of the effects, as the inſtructions of the deceaſed were in the nature of a will; and the third of the property is the fund for the execution of a will. The ground of the doctrine of the *Záhir Rawáyet* is, that as the executor, in the ſale of the ſlave, was deceived by the teſtator, the reſtitution made by him to the purchaſer is therefore a debt due to him from the teſtator; and the debts are diſcharged from the *whole* of the eſtate,

An executor, having ſold and received the price of an article which after-
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perty of another, is ac-

ceived;

not from the third. It would be otherwiſe if the *Kázee*, or his *Ameen*, ſhould ſell the ſlave, and he afterwards prove the property of another; for in this caſe the obligations of the ſale do not reſt upon thoſe officers, but the purchaſer comes at once upon the eſtate for an equivalent to the price loſt or deſtroyed as above; ſince otherwiſe the door of magiſtracy would be ſhut, and the rights of mankind conſequently injured, as no man will undertake the office of *Kázee* unleſs he be exempted from reſponſibility. It is to be obſerved that what is now advanced, that "the executor is to take an equivalent from the effects of the deceaſed," proceeds on the ſuppoſition of theſe being ſufficient to anſwer this purpoſe; for if they be inadequate to it, the executor is entitled to an indemnification only in the greateſt poſſible degree; and if the deceaſed ſhould have no effects whatever, the executor (like any other creditor) has no claim for indemnification.

if this have been loſt, he may reimburſe himſelf from the perſon to whom the article had fallen by inheritance.

If an executor ſell a ſlave which had fallen to the ſhare of a child of the deceaſed, and take poſſeſſion of the price, and it be afterwards loſt in his hands, and the ſlave prove the property of another perſon, the purchaſer has in that caſe a claim for reſtitution from the executor, who is entitled to indemnify himſelf from the ſhare of the child in whoſe behalf he acted;—and the child is entitled to an equivalent from the ſhares of the other heirs; for upon the ſlave proving the property of another perſon, the diſtribution of inheritance, as at firſt executed, is annulled, the caſe being, in fact, the ſame as if no ſuch ſlave had ever exiſted, or been accounted upon as part of the eſtate.

An executor may accept a [illegible]er for a [illegible] ward,

If a perſon indebted to an orphan give a transfer on ſome other perſon, and the executor (the guardian of the orphan) accept the ſame, ſuch acceptance is approved, provided it be for the intereſt of the orphan, becauſe of the perſon on whom the transfer is made being richer (for inſtance) than the transferrer, and alſo a man of probity; for the power of acting is veſted in the executor, merely that he may employ it for the intereſt of the orphan:—but if the transferrer be richer than the other, the acceptance is not approved, as being, in its tendency, prejudicial to the orphan.

or ſell or purchaſe moveables on his account.

It is lawful for an executor to ſell or purchaſe moveables, on account of the orphan under his charge, either for an equivalent, or at ſuch a rate as to occaſion an inconſiderable loſs,—but not at ſuch a rate as to make the loſs great and apparent; becauſe, the appointment of an executor being for the benefit of the orphan, he muſt avoid loſſes in as great a degree as poſſible;—but with reſpect to an *inconſiderable* loſs, as in the commerce of the world it is often unavoidable, it is therefore allowed to him to incur it, ſince otherwiſe a door would be ſhut to the buſineſs of purchaſe and ſale.

An executor, in giving a bill of ſale, muſt not inſert his power as an executor in it, but muſt give a ſeparate paper to that effect, out of caution; for if the latter alſo were inſerted, it might happen that the witneſs to the ſale might ſet his name to the bottom of the inſtrument without examination, which would implicate a falſe teſtimony, ſince with the executorſhip he has no concern. Some, moreover, have aſſerted that the atteſtation of the witneſs ought to run in this manner—“ Sold by *Zeyd* the ſon of *Omar*,” and not “ by *Zeyd* the “ executor of ſuch a perſon:”—but others maintain that this is immaterial, and that the latter mode may with propriety be adopted, as executorſhip is a matter of notoriety.

He may alſo ſell moveables on account of an abſent adult

An executor has the power of ſelling every ſpecies of property belonging to an adult abſent heir, excepting ſuch as is immoveable;—for as a father is authoriſed to ſell the moveable property of his adult abſent ſon, but not ſuch as is immoveable, his guardian [the executor] has the ſame power. The ground of this is, that the ſale of moveable property is a ſpecies of conſervation, as articles of that deſcription are liable to decay, and the price is much more eaſily preſerved than the article itſelf. With reſpect, on the contrary, to immoveable property, it is in a ſtate of conſervation in its own nature, whence it is unlawful to ſell it,—unleſs, however, it be evident that it will otherwiſe periſh or be loſt, in which caſe the ſale of it is allowed.

He cannot trade with his ward's portion.

It is not lawful for an executor to trade with the property of the orphan; for the *conſervation* of it, merely, is committed to him, not the power of *trading* with it,—according to what is mentioned in the *Awzah* upon this ſubject.

He may ſell moveable property on account of the infant or abſent adult brother of the teſtator.

According to *Mohammed* and *Aboo Yooſaf*, the executor of a brother, with reſpect to an infant brother, or one of mature age, who is abſent, ſtands in the ſame predicament as the executor of a father with reſpect to his adult abſent ſon;—(in other words, he is empowered to ſell the moveable property of the orphan or abſentee;) and ſo likewiſe of an executor appointed by the mother or uncle; for as the mother and uncle are permitted to interfere in the management of the property ſo far as relates to its preſervation, ſo alſo is the executor who repreſents them.

The power of a father's executor precedes that of the grandfather.

The power of the father's executor, in the management of the property of his orphans, is ſuperior to, and precedes that of the grandfather. *Shafeï* is of opinion that in this reſpect the grandfather has the ſuperior power; becauſe the LAW has ordained him to be the repreſentative of the father, where the latter has ceaſed to exiſt,—whence it is that [failing the father] the grandfather inherits to his grandſon. The argument of our doctors is, that as, in conſequence of the will, the authority of the father devolves upon his executor, the executor's authority is therefore that of the father, in effect,—and conſequently the father's executor precedes the grandfather, in the ſame manner as the father himſelf would. The ground of this is, that as the father, notwithſtanding the exiſtence of the grandfather, appointed another to act for his children, it may be thence inferred that he conſidered ſuch appointment more beneficial to them than if they had been left to the management of the grandfather.

If there be no executor, the grandfather is the father's repreſentative.

If a father die without appointing an executor, the grandfather repreſents the father*; becauſe a grandfather is moſt nearly related to the children of his ſon, and moſt intereſted in their welfare;—whence it is that the grandfather is empowered to contract the infant wards in marriage, in preference to the father's executor,—notwithſtanding the latter have precedence of him in point of managing and acting with the property, for the reaſons already aſſigned.

# CHAP. VIII.

## Of Evidence with reſpect to Wills.

The evidence of two [illegible] to ap[illegible] of a third is not valid unleſs [illegible]

If two executors give evidence that the deceaſed had aſſociated a third perſon with them, and that perſon deny his having done ſo, the evidence of the executors is of no effect; becauſe their aſſertion having a tendency to their own advantage, in the caſe it will afford them from part of their labour, lays them open to ſuſpicion. If, on the contrary, the third perſon claim or admit of the executorſhip, their evidence is valid, on a favourable conſtruction. Analogy would ſuggeſt that here alſo the evidence is null, in the ſame manner as in the former inſtance, and for the ſame reaſon. The ground of a more favourable conſtruction, in this particular, is that as the *Kâzee* has the power of either appointing an executor at the firſt, or aſſociating a third perſon (by that perſon's conſent) with the two executors, without any teſtimony on their part, it follows that their teſtimony merely prevents the *Kâzee* from the trouble of nomination, by rendering it unneceſſary for him to ſeek out and name a proper perſon to aſſiſt in the executorſhip;—the perſon ſtill, however, holding his office in virtue of the *Kâzee*'s nomination.

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* Literally, "*is in the ſtead of*," or "*ſtands in the place of.*"

The evidence of *orphans* to the appointment of an executor is not admitted if he deny it.

If two orphans give evidence that their deceaſed father had appointed a particular perſon his executor, and the perſon mentioned deny the ſame, their evidence is not credible, being liable to a ſuſpicion in the advantages they would draw from the labours of a perſon exerted towards the preſervation of their property.

The teſti

property, on behalf of an infant,

If two executors give evidence, on behalf of an infant heir [their ward] concerning property of the deceaſed, or of any other perſon, it is of no effect; becauſe their teſtimony merely tends to prove their right to the management of ſuch property.

or of an abſent adult, is

If two executors give evidence, on behalf of an *adult* heir, concerning property of the deceaſed, it is of no effect; but it is valid concerning property appertaining to any other perſon. This is the doctrine of *Haneefa*. The two diſciples are of opinion that in both caſes the evidence is valid, becauſe it is not liable in either of them to any ſuſpicion, as the power of an executor over the property ceaſes after the heir attains to maturity. The argument of *Haneefa* is, that as executors have the power of conſervation, and alſo of ſelling the moveable property of an adult heir in his abſence, it follows that their evidence, in favour of an adult heir, concerning any part of the deceaſed's eſtate, is not altogether free from ſuſpicion. It is otherwiſe with reſpect to their evidence, in behalf of an adult heir, concerning any other property, for over that the executors cannot poſſeſs any authority, as the deceaſed conſtituted them his ſubſtitutes with reſpect to his own eſtate only, not with reſpect to the property of others.

The mutual evidence of parties, on behalf of each other, to debts due to e from an esta is valid; b not their evidence to legacies,

If two perſons bear evidence to a debt of one thouſand *dirms*, due from a perſon deceaſed to *Omar* and *Zeyd*, and *Omar* and *Zeyd* give a ſimilar evidence in favour of theſe two, the evidence on both parts is valid. If, on the contrary, each of the parties in the ſame manner give evidence that legacies had been left by the deceaſed to the other, their atteſtations are of no effect. This is the doctrine of *Haneefa* and *Mohammed*. *Aboo Yoosaf* maintains that in neither caſe are theſe evidences valid; and ſuch alſo (according to the relation of *Khaſaf*) is the opinion of *Haneefa*. There is alſo a tradition of *Aboo Yoosaf* having concurred in the opinion of *Mohammed*. The reaſons urged in ſupport of the validity of the evidence, in the caſe of debt, is that debt relates ſolely to the perſon; and as the perſon admits a great variety of rights, the evidence of both parties is therefore admitted.— Neither does it follow, in this caſe, that either party is to partake of what may be obtained in payment by the other, ſo as to cauſe the evidence of this party to be a mere eſtabliſhment of their own right of participation,—inſomuch that if a ſtranger were to pay, to one of the parties, of his own accord, the debt alleged to be due to that party, ſtill the other party is not at liberty to claim any ſhare in ſuch payment. The reaſons, on the other hand, againſt the validity of the evidence, in this inſtance, is that as the death [of the debtor] occaſions the relation to ſhift from the perſon to the property, ſince in conſequence of the deceaſe the perſon no longer remains, (inſomuch that if any one party were to obtain payment of his right from the of the deceaſed the other party participates with them therein, provided the eſtate ſuffice for the diſcharge of the debts of both,) it follows that the evidence of each, reſpectively, in behalf of the other, tends to eſtabliſh a right of participation in whatever payment that other may obtain in conſequence; and accordingly, the teſtimony is here liable to ſuſpicion. It is otherwiſe where the debtor is *living*; for in that caſe the teſtimony of each party [of creditors] on behalf of the other is admitted; ſince as the debt, at that time, reſts upon his *perſon*, not upon his *property*, (the former ſtill continuing exiſtent,) a participation, therefore, is not eſtabliſhed in this inſtance.

**unleſs each legacy, reſpectively, conſiſt of a ſlave.**

If two perſons give evidence that a particular perſon had bequeathed his female ſlave in a legacy to two others, and the two others give evidence that the ſame perſon had bequeathed a male ſlave to theſe two, both evidences are valid; for as their teſtimony does not in any reſpect tend to eſtabliſh a participation, it is therefore liable to no ſuſpicion, and muſt be admitted accordingly.

**A mutual evidence of this nature is void where it involves a right of participation in the witneſſes.**

If two perſons give evidence that a particular perſon had bequeathed the third of his property to *Zeyd* and *Amroo*,—and *Zeyd* and *Amroo*, on the other hand, give evidence that the ſame perſon had bequeathed a third of his property to theſe two, the evidence of both parties is void and of no effect; (and ſo likewiſe if the two were to give evidence that the perſon had bequeathed his male ſlave to *Zeyd* and *Amroo*,—and *Zeyd* and *Amroo*, on the other hand, give evidence that the ſaid perſon had bequeathed his female ſlave to thoſe two;)—becauſe as the evidence on each part tends, in thoſe inſtances, to eſtabliſh a right of participation, it is therefore not altogether free from ſuſpicion.

# *HEDAYA.*

## BOOK LIII.

## Of *HERMAPHRODITES.*

### SECT. I.

### *Of who are* HERMAPHRODITES.

Hermaphrodites are either *male*, *female*,

A *KHOONSA*, or hermaphrodite, is a perſon poſſeſſed of the parts of generation of both a man and a woman. If, therefore, ſuch perſon diſcharge urine from the male member he[*] is accounted a male, or if from the female member, a female;—becauſe it is ſo recorded in the traditions, and likewiſe reported from *Alee*; and alſo, becauſe the circumſtance of the urine being diſcharged from either member in particular, denotes that member to be the original, and the other merely a defect. If, on the contrary, the perſon diſcharge the urine from both members, regard is paid to that from which it firſt proceeds, as this denotes that member to be the original. If, on the other hand, the perſon diſcharge his urine from both members equally (that is, at one and the ſame time) he is a *Khoonſá-mooſh'kil*, or equivocal hermaphrodite, according to *Haneefa*;—nor is any regard paid to the ſuperior or inferior quantity of the urine in this inſtance, becauſe a ſuperiority of diſcharge from either member does not denote that member to be the primary, ſince this circumſtance ariſes merely from the urinary paſſage in the one being wider than in the other. The two diſciples maintain that regard muſt in this caſe be paid to the comparative quantity of urine; and conſequently, that the ſex is determined according to the member from which the greateſt quantity proceeds; becauſe this denotes that member to be the ſuperior and original; and alſo, becauſe the greater quantity is, in effect of law, the *whole*. From whichever member, therefore, the principal quantity of urine is diſcharged, that member is accounted the ſuperior. If, however, the urine proceed from both paſſages alike, (that is, at the ſame time, and in equal quantity,) the perſon is accounted an equivocal hermaphrodite, according to all our doctors, as in this caſe neither member poſſeſſes any ſuperiority over the other.—What is here advanced applies ſolely to hermaphrodites not yet arrived at the age of maturity;—for upon an hermaphrodite attaining to maturity, if his beard grow, or he have connexion with a woman, or nocturnal emiſſions, or his breaſts appear as thoſe of a man, he is accounted a male, thoſe being indiſputable tokens of manhood;—but if the breaſts ſwell like thoſe of a woman, or the menſtrual diſcharge appear, or pregnancy, or carnal connexion with a man, the hermaphrodite is accounted a female, ſuch being the tokens of womanhood.

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[*] The *gender* of an *abſolute* hermaphrodite is dubious. The tranſlator follows the *Arabic* text in expreſſing it throughout in the *maſculine*, that being the moſt generally applicable.

*or ambiguous.*

If, on the contrary, no diſtinguiſhing tokens of either ſex appear, or the tokens of both, (ſuch as a beard, with the breaſts of a woman,) the perſon is an *equivocal* hermaphrodite.

## SECT. II.

### *Of the Laws reſpecting equivocal* HERMAPHRODITES.

It is a rule, with reſpect to equivocal hermaphrodites, that they are required to obſerve all the more *comprehenſive* points of the ſpiritual law, but not thoſe concerning the propriety of which [in regard to *them*] any doubt exiſts.

An equivocal hermaphrodite

An equivocal hermaphrodite, in ſtanding behind the *Imám* for the purpoſe of prayer, muſt take his ſtation immediately after the men and before the women, as it is poſſible that he may be a man, and it is alſo poſſible that he may be a woman. If, therefore, he chance to ſtand among the women, he muſt recite the prayers repeatedly, for as it is poſſible he may be a man they would otherwiſe be nugatory. If, on the contrary, he ſtand among the men, his prayers are valid; but the men who are next to him are to recite their prayers repeatedly, out of caution, as it is poſſible that he may be a female.

muſt take his ſtation, in public prayers, between the *men* and the *women*,

It is laudable in an equivocal hermaphrodite to cover his head, during prayer, with the ſkirt of his garment, and alſo to ſit in the poſture of women; for if he be a man, this is merely a deviation from cuſtom, which does not imply any poſitive illegality; but if he be a

obſerving (in other reſpects) the cuſtoms of women.

female, his neglecting ſo to do would induce an abomination, it being indiſpenſably incumbent on women to be covered upon that occaſion. It is alſo laudable in him, if he be without a garment, to recite the prayers repeatedly; but ſtill the prayers are lawful although he ſhould neglect ſo to do. It is, moreover, abominable in him to wear ſilk or jewels.

not appear naked before man or woman, or travel along with either, except a relation; and he muſt be circumciſed by a ſlave purchaſed for that purpoſe.

It is abominable in an equivocal hermaphrodite to appear naked before either man or woman, or to be in retirement with either man or woman except his prohibited relations. In the ſame manner, it is abominable in him to journey in company with a man other than his prohibited relation,—or with a woman notwithſtanding ſhe be a prohibited relation, as it is not lawful for two women to travel together, although they be relations. It is alſo abominable that he be circumciſed by either a man or a woman; and therefore, to perform this ceremony, a female ſlave muſt be purchaſed at his expence;—or, if he be deſtitute of property, the price of ſuch ſlave muſt be advanced to him, by way of loan, from the public treaſury, with which he may purchaſe her for the purpoſe of circumciſing him; and having ſo done, ſhe is to be ſold, and her price paid into the treaſury, as he has then no farther occaſion for her.

to be by ig a pilgrimage.

If an equivocal hermaphrodite undertake a pilgrimage during his adoleſcence, (that is, when nearly arrived at maturity,) *Aboo Yooſaf* declares he is uncertain which mode of dreſs is moſt proper for him to adopt; for if he be a male, his wearing a ſeamed garment is abominable; and if he be a female, it is abominable to wear any thing elſe. *Mohammed*, however, ſays that he ought to wear a ſeamed garment, in the ſame manner as women; becauſe it is ſtill more abominable for a woman to neglect this during pilgrimage than for a man to wear it.

Divorce or
ſtance of *ſex* are not determined, in
dite,

If a man ſuſpend the emancipation of his ſlave, or the divorce of his wife, upon the circumſtance of her producing "a male child," and ſhe be delivered of an *hermaphrodite* child, the divorce or emancipation do not take place until the ſex or condition of the child be fully aſcertained, ſince the perſon cannot incur the penalty, in this inſtance, becauſe of the doubt.

until his ſex be aſcertained.

If a man declare, "all my male ſlaves are free," or, "all my "female ſlaves are free,"—and he be poſſeſſed of an hermaphrodite ſlave, this ſlave is not emancipated until his real condition be aſcertained, ſince here the maſter cannot be forſworn, becauſe of the doubt. If, on the contrary, he thus mention his male and female ſlaves together, the hermaphrodite is in that caſe emancipated, ſince one or other deſcription applies to him indiſputably, as he muſt be either a male or female.

His
tion of his ſex is not admitted.

If an hermaphrodite declare himſelf to be a male, or a female, and he be of the equivocal deſcription, his declaration is not credited, as his plea is repugnant to the ſuggeſtion of proof. But if he be not of an equivocal deſcription, his declaration may be credited, he being better acquainted with his own ſtate than any other perſon.

Rules to be
ment.

If an equivocal hermaphrodite die before his condition be aſcertained, the ceremony of ablution muſt not be performed upon his body by either man or woman, neither of thoſe being allowed to perform it to the other. Ablution, therefore, being impracticable in this inſtance, the ceremony of *teyummim* [rubbing with duſt or ſand] muſt be ſubſtituted for it;—and it is mentioned in the *Jama Ramooz*, that if the *teyummim* be performed by any other than a prohibited relation, the hand muſt be covered with a cloth.

If a hermaphrodite die at an age bordering on maturity, (at twelve years of age, according to the *Jama Ramooz*,) the corpſe is not to have the ceremony of ablution performed upon it, whether it be male or female. Upon depoſiting it, moreover, in the tomb or grave, it is laudable to cover the ſame with a cloth, this being indiſpenſable with reſpect to women, although not with reſpect to men.

When there is occaſion to repeat the funeral prayers over a man, a woman, and a hermaphrodite, at the ſame time, the bier of the man muſt be placed next the *Imâm*, that of the hermaphrodite next, and beyond all the bier of the woman.

Where there is any reaſon for interring a hermaphrodite in the ſame tomb [or grave] with a man, the former muſt be depoſited after the latter, as it is poſſible that he may be a female; and a partition of earth muſt alſo be conſtructed between them. If, on the other hand, a hermaphrodite be interred in the ſame tomb [or grave] with a woman, he muſt be depoſited firſt, as it is poſſible that he may be a man.

It is laudable to ſhroud the body of a hermaphrodite in the ſame manner as that of a woman, by wrapping it in five cloths; for, if it be a female, ſuch is the ordained practice with reſpect to women; and if it be a male, this is merely an exceſs of two cloths, which is a matter of no moment.

**Rules of inheritance with reſpect to hermaphrodites.**

If a man die, leaving two children, one a hermaphrodite, and the other a ſon, in that caſe, according to *Haneefa*, the whole inheritance is divided between them in three ſhares, two going to the ſon, and one to the hermaphrodite; becauſe he holds a hermaphrodite to be ſubject to the law of a woman, unleſs his condition be aſcertained to be otherwiſe. *Shobbàia*, on the contrary, maintains that in this caſe the hermaphrodite is to receive half the ſhare of a male heir, and half the ſhare of a female,—by firſt calculating the amount of his ſhare, ſuppoſing him to be a male, and then the ſame ſuppoſing him to be a female, and adding the two together, and paying him a moiety of the added ſums. *Mohammed* and *Aboo Yooſaf* ſubſcribe to this opinion. They, however, differ in their expoſition of it; for *Mohammed* holds that the whole inheritance is to be divided into twelve parts, ſeven of which go to the ſon, and five to the hermaphrodite;—whereas *Aboo Yooſaf* alleges that it is to be divided into ſeven parts, four of which go to the ſon, and three to the hermaphrodite. The argument of *Aboo Yooſaf* is that the ſon, if he ſtood alone, would be entitled to the whole inheritance; and the hermaphrodite, if he ſtood alone, would be entitled to three fourths of the inheritance,—he being entitled (when ſtanding alone) to an half, if accounted a male, or to the whole, if accounted a female; for the whole property conſiſts of four quarters, the half of which is two quarters,—and theſe, being added together, make ſix quarters, the half of which is three. Where, therefore, thoſe two unite in one inheritance, the eſtate is divided between them according to their reſpective proportions of right; and as the right of the ſon is to *four* fourths, and that of the hermaphrodite to *three* fourths, the former gets in the proportion of four, and the latter in the proportion of three;—and accordingly, the whole inheritance is divided into ſeven parts, four of which go to the ſon, and three to the hermaphrodite. The argument of *Mohammed* is that, ſuppoſing the hermaphrodite to be a male, the inheritance would be divided between him and the ſon in equal ſhares; or ſuppoſing him (on the other hand) to be a *female*, it would be divided between them in three lots. We muſt therefore have recourſe to the ſmalleſt number which admits of diviſion by *two* and by *three*; and as this number is ſix, it follows that on the former ſuppoſition the inheritance is to be divided equally between the two, three ſhares of the ſix going reſpectively to each,—or that, on the latter ſuppoſition, it is to be divided between them in three lots, two ſhares of the ſix going to the hermaphrodite, and four ſhares to the ſon. The hermaphrodite, therefore, is entitled to two ſhares, unqueſtionably; and there being ſtill a doubt with reſpect to the one redundant ſhare, that is divided into two. Hence the hermaphrodite gets two ſhares and an half; and a fraction thus falling to his ſhare, the root of the propoſition (ſix) muſt be multiplied by two, in order that there may be no fractions*; and the whole calculation, being twelve, will come out right, in this way, that five go to the hermaphrodite, and ſeven to the ſon. The argument of *Haneefa* is, that it is neceſſary, in the firſt place, to eſtabliſh the hermaphrodite's right in the inheritance; and as the ſmaller portion of inheritance (namely, that of a woman) is unqueſtionable, and any thing beyond it is doubtful, that alone is to be eſtabliſhed, and due, which is certain and indiſputable, not any more, as a right to property is not admitted under any circumſtance of doubt,—the point in queſtion being, in fact, the ſame as where a doubt exiſts with reſpect to a right in property, founded on any other cauſe beſides inheritance, in which caſe the *unqueſtionable* proportion only would be decreed, and ſo here likewiſe;—excepting, however, in the caſe of a *ſmaller* ſhare† going to the hermaphrodite, ſuppoſing him to be a *male*; for then he would be entitled to the ſhare of a ſon, ſince, in ſuch inſtance, that would be his indiſputable right; - as where, for inſtance, a woman dies, leaving heirs her huſband, mother, and a full ſiſter‡ who is an hermaphrodite,—or, where a man dies, leaving heirs his wife, two maternal brothers, and a full ſiſter who is an hermaphrodite;—in the former of which caſes (according to *Haneefa*) one half of the property would deſcend to the huſband, a third to the mother, and the remainder to the hermaphrodite,—and in the latter, a quarter would deſcend to the wife, a third to the two brothers, and the remainder to the hermaphrodite; for in both theſe caſes the remainder is ſmaller than either of the two full ſhares,—that is, the ſhare of the hermaphrodite ſuppoſing him to be a man, and the ſame ſuppoſing the hermaphrodite to be a woman.

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* That is, in order to reduce the whole to integral parts.

† Namely, a ſmaller ſhare than the half of the whole.

‡ This might be rendered, with more ſtrict propriety, "*a fraternal connexion*," an hermaphrodite being, in fact, neither a brother nor ſiſter. The tranſlator, however, thinks it moſt adviſeable to adhere literally to the original.

# *HEDAYA.*

## CHAPTER THE LAST.

## *MISCELLANEOUS CASES.*

The intelligible ſigns of a dumb perſon ſuffice to verify his bequeſts, and render them valid; but not thoſe of a perſon merely *deprived of ſpeech*.

WHERE people read a deed of bequeſt to a dumb perſon, and deſire to know whether they ſhall teſtify ſuch deed on his behalf? and the dumb perſon makes a ſign by an inclination of the head, equivalent to the expreſſion of aſſent "*Yes!*"—or, where a dumb perſon himſelf writes ſuch deed, and they thus deſire to know whether they ſhall teſtify it on his behalf? and he makes a ſign, by an inclination of his head, in the affirmative,—the bequeſt, provided the ſign be made in ſuch a manner as is commonly uſed to denote affirmation, is valid:—but this mode of affirmation by a ſign does not ſuffice with reſpect to a perſon whoſe inability to ſpeak is ſupervenient, occaſioned (for inſtance) by ſome recent diſorder.—*Shafeï* maintains that the ſign in queſtion is cognizable and valid equally with reſpect to both; for the inability alone is the cauſe of its being at all admitted as ſufficient, a cauſe which exiſts alike in both.—Our doctors, however, conceive a natural difference between a perſon originally dumb, and one who merely labours under a recent incapacity of ſpeech, for various reaſons.—FIRST, ſigns are not cognizable, unleſs they be habitual and their meaning aſcertained, which is the caſe with the ſigns of a dumb perſon, but not with thoſe of one who has merely loſt his ſpeech. (Still, however, our doctors hold that if this perſon be ſo long deprived of ſpeech as to render ſigns habitual to him, and their meaning aſcertained, he then ſtands in the ſame predicament with a *dumb* perſon in this particular.)—SECONDLY, the perſon in queſtion is chargeable with a neglect in not having made his will before he had loſt his ſpeech, whereas no ſuch neglect can be charged to the *dumb* perſon.—THIRDLY, it is moſt probable that a recent incapacity of ſpeech will be removed and yield to remedies, which is not the caſe with dumbneſs, and therefore there is no analogy between them.

WHERE a dumb perſon is capable of either writing intelligibly, or making intelligible ſigns, marriage, divorce, purchaſe, or ſale, declared by him, are valid, and retaliation is alſo executed on his behalf, or upon him; but he is not liable to puniſhment[*], nor is puniſhment inflicted on his behalf.—His written deeds are valid, and cognizable, for this reaſon, that the writing of an abſentee is equivalent to the oral declaration of a perſon actually preſent; (inſomuch that the prophet, in promulgating his laws, ſometimes uſed one mode, and ſometimes another;) and *neceſſity* is the ground of validity with re-

**A dumb perſon may execute mar-**

**ſale, and ſue for or incur**

**he cannot thereby ſue**

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[*] Meaning, *puniſhment for offences againſt* GOD, namely, for *whoredom* and *ſlander*; as is explained a little farther on.

for or incur retaliation.

ſpect to the writing of an abſentee, which ground exiſts ſtill ſtrongly in the caſe of a *dumb* perſon.—It is to be obſerved that writings are of three different ſorts or deſcriptions: I. *regular teſtimonials* [*], (meaning, ſuch as are executed upon paper, and have a regular title, ſuperſcription, and ſo forth, as is cuſtomary,) which are equivalent to oral declaration, whether the perſon be preſent or abſent: II. *irregular* teſtimonials [†], (meaning, ſuch as are not written upon paper, but upon a wall, or the leaf of a tree, or, upon paper without any title or ſuperſcription,) which are not admitted as proof farther than merely as they ſignify the writer's object or deſign: and III. writings which are *not* teſtimonials in any ſenſe [‡], (meaning ſuch as are delineated in the *air*, or upon *water*,) which, as they are merely equivalent to words not heard, are no way cognizable, nor attended with any effect.—With reſpect to *ſigns* made by a dumb perſon, they are recognized in the caſes of marriage, divorce, and ſo forth, (as mentioned above,) from neceſſity, ſince thoſe are matters in which the right of the *individual* alone is concerned, and which are not reſtricted to any particular form of words, but are even, in ſome inſtances, (ſuch as of *Beeya-Taata*, or ſale by a mutual ſurrender [§],) effected without any words whatever; and retaliation alſo is a right of the individual.—But there is no *neceſſity* for *puniſhment*, as that is a right of GOD, whence the prevention of it by the exiſtence of any doubt,) and therefore, if a dumb perſon verify the report of a ſlanderer, ſtill he is not liable to puniſhment,—neither is puniſhment inflicted upon him if he himſelf ſlander another by ſigns, becauſe the ſlander is not *expreſs*, which is the condition of its being puniſhable.—The difference between puniſhment and retaliation is, that the former is not eſtabliſhed by *doubtful* evidence, whereas the latter is ſo;—for if witneſſes charge a particular perſon with "*illegal carnal connection*," or a perſon make confeſſion of "*illegal carnal connection*," ſtill puniſhment is not to be inflicted; whereas if witneſſes teſtify to "*a* " *murder*" in general terms, or a perſon make a confeſſion of "*a murder*," retaliation is inflicted, although the term "*wilful*" ſhould not have been expreſsly mentioned.—The ground of this is that retaliation poſſeſſes the character of *reciprocity*, as having been ordained for the reparation of injuries; and it is therefore admitted to be eſtabliſhed notwithſtanding a doubt, in the ſame manner as all other matters of reciprocity which concern the rights of the individual.—With reſpect, on the contrary, to ſuch puniſhments as are inflicted purely in right of GOD, they have been ordained for the purpoſe of determent; and as that does not bear the character of reciprocity, puniſhment, as not being a matter of neceſſity, is not eſtabliſhed under any circumſtance of doubt.—*Mohammed*, in treating of ACKNOWLEDGMENTS*, ſays "the writing of an abſentee is not cognizable as proof, with reſpect to retaliation;"—(in other words, if an abſentee ſend a written acknowledgment, inducing retaliation upon himſelf, ſuch acknowledgment is not cognizable.) Our author remarks, upon this paſſage, that it may be taken in two ways. FIRST, by the abſentee may be meant *any* abſentee, whether dumb or otherwiſe; and on this conſtruction the point admits of two determinations; the one, what is here mentioned; and the other, what has been before recited. SECONDLY, by the abſentee may be meant a perſon who is *not* dumb;—as if he [*Mohammed*] had ſaid "the writing of an abſentee, *not being dumb*, is not cognizable as proof with " reſpect to retaliation, ſince, having the power of ſpeech, it is " poſſible that he may himſelf appear, and make an expreſs confeſſion " by word of mouth;—an expectation which cannot be entertained " with reſpect to a *dumb* perſon, ſince it is impoſſible that ſuch

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[*] Arab. *Mooſt'been Marſoom.* It is a technical term, applied to all regular deeds, contracts, &c.

[†] Arab. *Mooſt'been Ghayr Marſoom.* This is the ſame term, only with the addition of the privitive *Ghayr.*

[‡] Arab. *Ghayr Mooſt'been.*

[§] See Vol. II. p. 361.

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* Probably in the *Mabſoot*.

" perſon ſhould ſpeak, ſo as to make an expreſs oral confeſſion."—Some of our doctors entertain an apprehenſion that the ſigns of a dumb perſon, who is at the ſame time able to write, are cognizable; becauſe ſigns are admitted as proof purely from neceſſity, which does not exiſt in this inſtance.—This apprehenſion, however, is repugnant to what has been before mentioned, as from *that* we are to infer that the ſigns of a dumb perſon are cognizable, notwithſtanding he be capable of writing; for as it is there ſaid that " if a dumb perſon make " ſigns, or write, it is valid," it follows that ſigns and writings are of equal weight, and that either of them ſuffices;—the reaſon of which is that ſigns and writings are, both of them, admitted as proofs purely from neceſſity; and as, on the one hand, writing poſſeſſes an explicitneſs of which ſigns are deſtitute (the deſign or meaning of the perſon being aſcertained indubitably from what he writes,) whereas ſigns are of an ambiguous nature, ſo, on the other hand, ſigns poſſeſs an explicitneſs of which writings are deſtitute, as they approach ſtill nearer to ſpeech;—and ſigns and writings are therefore upon an equal footing.

THE writing of a perſon who has been deprived of the uſe of ſpeech by any accident, for two or three days, is not cognizable, any more than that of an abſentee who is not dumb, ſince there is ſtill room to hope that he may be able to ſpeak, as his organs of ſpeech remain.

Caſe of

IF the carcaſes of ſlaughtered* goats be promiſcuouſly mixed with thoſe of carrion† goats, and the one be not known from the other,

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* Arab. *Mazbooh*, meaning thoſe regularly ſlain according to the preſcribed form of *Zabbah*. (See Vol. IV. p. 62.)

† Arab. *Moordár*, meaning thoſe which have died a natural death, or have not been ſlain according to the preſcribed form.

and

ing promiſcuouſly mixed with c

and the number ſlaughtered exceed the number of carrion, the perſons about to uſe them muſt make a deliberate ſelection, and eat ſuch only as they ſuppoſe moſt likely to have been lawfully ſlain.—But if the number of carrion exceed the number ſlaughtered, or if they be equal in number, none of them muſt be uſed.—What is here advanced applies ſolely to a ſituation which admits a latitude of choice; for in a ſituation of neceſſity the ſelection may be made under either circumſtance, and thoſe uſed which the people ſuppoſe moſt likely to have been lawfully ſlain; becauſe as, in time of want, indubitable carrion is allowed to be lawful, it follows that what comes within the poſſibility of having been duly ſlain is lawful *a fortiori*: but ſtill a deliberate ſelection muſt be made, ſince it is moſt likely that by this means thoſe will be uſed which have been duly ſlain; and the ſelection is therefore not to be diſpenſed with except in caſes of extreme urgency. *Shafeï* maintains that, in a ſituation which admits a latitude of choice, it is not lawful to eat any of the goats, notwithſtanding the number of thoſe duly ſlain exceed the number of the carrion; for as the ſelection is an argument of neceſſity, it is not to be practiſed except in a caſe of neceſſity, which does not apply to a ſituation admitting a latitude of choice. The argument of our doctors is, that the circumſtance of the ſlain goats exceeding the carrion in number is equivalent to neceſſity, whence the eating of ſome of them is lawful after a due ſelection;—in the ſame manner as it is lawful to take and uſe articles ſold in a *Muſſulman* market, becauſe of the greater number of commodities there exhibited being lawful, notwithſtanding a market be not altogether free from certain prohibited articles, ſuch as *ſtolen* or *uſurped* goods, and the like; the ground of which is, that as it is not always poſſible to make a diſtinction with reſpect to *ſmall* matters, a regard to them is remitted, ſince otherwiſe the buſineſs of life could not be carried on; and accordingly, a ſmall degree of dirt, or of nakedneſs, in prayer, is not of any moment. In a caſe, therefore, where the number of ſlaughtered goats exceeds that of the carrion, the eating of ſome of them is allowed, from a ſpecies of neceſſity. It is otherwiſe where the number of the carrion exceeds or equals that of the ſlain; for in this caſe, ſuppoſing the ſituation to be ſuch as admits a latitude of option, no neceſſity whatever exiſts.

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# ERRATA in the FOURTH VOLUME.

Page 37, line 23, *for* maintaining, *r.* maintains.
76, —— 2, — *Eed*, r. *Yd.*
116, —— 11, — dependances, *r.* dependancies.
219, —— 14, — conſider, *r.* conſidered.
244, —— 8, — on, *r.* in.
403, —— 2, (note,) for *verſion*, r. *text.*
505, —— 4, for *in*genders, *r.* *en*genders.
548, —— 14, — exiſtence, *r.* aſſiſtance.